TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1928

No. [redacted] 657

ALBERT S. WILLIAMS, COMMISSIONER OF FINANCE OF THE STATE OF TENNESSEE; L. D. SMITH, ATTORNEY GENERAL OF THE STATE OF TENNESSEE, AND R. M. ATKINSON, ETC., APPELLANTS,

vs.

THE TEXAS COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

FILED FEBRUARY 10, 1928

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SUPREME COURT OF THE UNITED STATES

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INDEX

	Page
Record from the district court of the United States, Middle Tennessee	1
Caption	1
Bill of complaint	2
Exhibit A—Senate Bill No. 282	13
Affidavit of Amos L. Beaty	21
R. C. Holmes	22
W. W. Bruce	24
Restraining order	25
Motion to dismiss and answer	26
Exhibit No. 1—Decree in case of State ex rel. Attorney General vs. Standard Oil Co. of Kentucky	37

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 18, 1928

Page

Exhibit No. 2—Decree in case of State of Tennessee vs. Standard Oil Co. of Kentucky 58
Exhibit No. 3—Bill of complaint in case of Consumers' Supply Co. et al. vs. Standard Oil Co. of Louisiana et al.. 61
Exhibit No. 4—Separate answer of Standard Oil Co. of Louisiana 77
Exhibit No. 5—Decree and memorandum 94
Order of substitution 102
Opinion per curiam 105
Order granting interlocutory injunction 110
Injunction 113
Order of substitution 114
Petition for appeal 115
Assignments of error 116
Order allowing appeal 118
Bond on appeal 119
Citation and service 120
Order extending time 120
Praecipe for transcript of record 121
Clerk's certificate 122
Order extending time to file statement of points 123
Statement of points to be relied upon and designation of parts of record to be printed 123

In the

District Court of the United States

For the Middle District of Tennessee,
Nashville Division.

THE TEXAS COMPANY,

A Corporation Organized and Existing under the Laws of the State of Texas,

vs.

FRANK S. HALL, Commissioner of Finance and Taxation of the State of Tennessee,

L. D. SMITH, Attorney-General of the State of Tennessee,

R. M. ATKINSON, District Attorney-General of the State of Tennessee for the Tenth Judicial Circuit, Embracing Davidson County,

All Being Residents and Citizens of the State of Tennessee.

No. 305.

TRANSCRIPT OF RECORD.
COURT CAPTION, MARCH TERM, 1927.

Being the second Monday of March, 1927. Be it remembered that at a District Court of the United States, begun and held for the Nashville Division of the Middle District of Tennessee at the Federal Court Room in the City of Nashville, within said district, and the Sixth Circuit on the second Monday, it being the 14th day of March, 1927.

Court met pursuant to adjournment, present and presiding the Honorable Charles H. Moorman, Judge of the United States Circuit Court of Appeals for the Sixth Judicial Cir-

cuit, present and presiding the Honorable Xen Hicks, United States District Judge for the Eastern and Middle Districts of Tennessee, and present and presiding the Honorable John J. Gore, United States District Judge for the Middle District of Tennessee, when the following proceedings were had, to-wit:

ORIGINAL BILL.

(Filed April 9, 1927.)

Plaintiff, The Texas Company, a corporation organized under the laws of the State of Texas, complains of the defendants, Frank S. Hall, Commissioner of Finance and Taxation of the State of Tennessee; L. D. Smith, Attorney-General of the State of Tennessee, and R. M. Atkinson, District Attorney-General of the State of Tennessee for the Tenth Circuit, embracing Davidson County, and respectfully shows to the Court:

I.

That plaintiff is, and has been for a number of years, a corporation organized and existing under the laws of the State of Texas, with its principal office and place of business at Houston, Texas; that for several years it has been qualified under the laws of the State of Tennessee to do business in Tennessee. Plaintiff has fully complied with the statutes and provisions of the State of Tennessee in reference to foreign corporations doing business in this State.

The plaintiff company was organized in the year 1902, for the purpose, primarily, of taking advantage of what its organizers conceived to be an opportunity for the development of the oil business by an independent company, uncontrolled by any alliance with any other company, at a time when the production of oil was beginning to be unusually large in the State of Texas and surrounding States.

In the process of its development, it has been, and is now engaged, in the purchase and storage of oil for future refinement and sale. It has also established refineries, and from time to time has engaged in the purchase of crude oil, and in the refining, transportation, and sale of oil and gasoline, and petroleum products throughout the country. Plaintiff has acquired and now owns wells in seven States of the Union; has constructed and is now operating a vast system of pipe lines from its own wells, and other wells, to its refineries. Plaintiff has established, and is now maintaining and operating six refineries, three of them within the State of Texas, one in the State of Oklahoma, one in the State of Wyoming, and one in the State of Illinois.

Plaintiff has invested in the development of its business many millions of dollars, and is now actively engaged in the sale of gasoline in forty-two states of the Union, and is exporting gasoline to practically every foreign country where there is an open market.

II.

For several years plaintiff has been engaged in the business of selling gasoline in the State of Tennessee. Sometimes it is engaged in the sale of gasoline and oil in interstate commerce, the sale of gasoline and oil in tank car lots, but at the present time it is engaged in the sale of gasoline in tank wagons from its established stations and depositories throughout the State of Tennessee to retail dealers.

At a number of points within the State of Tennessee, including Nashville, Memphis, Chattanooga, Knoxville, Shelbyville, Johnson City, and Greeneville, Tennessee, plaintiff either actually owns or leases, or controls by contract, a storage plant consisting of storage tanks, warehouses, etc. These stations are called wholesale distributing stations, but they are controlled and operated by plaintiff through its regularly engaged agents. When oil or gasoline is shipped from the refinery to any one of these separate stations it is shipped as the property of the plaintiff, and is billed that way, and then the gasoline is unloaded from the cars and stored in the tanks or warehouses hereinbefore mentioned.

The sale of gasoline is conducted in the following manner:

It engages its own agents at each one of these points. The agent is compensated for his services in the sale and delivery of gasoline by salary or commissions, as the case may be. These agents are now engaged in selling the gasoline, and have been so engaged for a number of months, to purchasers operating service stations.

Plaintiff has built up a large business in the State of Tennessee, mainly confined to the method of sale and dis-

tribution hereinbefore set out. Through the agents of this plaintiff in control of the various depots or stations, a large number of tank wagons are operated over diverse and various routes throughout the communities in which these stations are the centers, and plaintiff in this way is selling thousands of gallons of gasoline daily to filling stations throughout the State of Tennessee.

During the year 1926, plaintiff's business grew and increased in volume and in revenue very largely. Fo. example, in January, 1926, the total gallons of gasoline sold in the month were 596,162, while in July of that same year it reached the high point of 1,011,752, and for four months of that year, including the month of July, its total sales per month averaged more than 950,000 gallons; and during the entire year of 1926, plaintiff sold in the State of Tennessee, 9,759,742 gallons of gasoline.

Plaintiff avers that during the year 1927, its business has continued to show an increase over the corresponding months of the previous year. For the month of January, 1927, plaintiff's total sales aggregated 736,365 gallons, as against 596,162 gallons in January, 1926, or an increase of approximately 140,000 gallons. For the month of February, 1927, the sales aggregated 660,130 gallons, as against 563,-740 for the month of February, 1926, or an increase of approximately 100,000 gallons for that month, while in the month of March, 1927, the total sales by the plaintiff in Tennessee were 924,988 gallons, as against 662,141 gallons sold in March, 1926, or an increase of approximately 260,000 gallons over the sale in the month of March, 1926.

Plaintiff avers that if the month of April shows the same ratio of increase as the months of January and February and March, its business for the month of April would approximate the sale of a million gallons of gasoline in that month.

Plaintiff further avers, that during the year 1926, its gross revenue from the sale of gasoline aggregated over two millions of dollars, and its average for the spring and summer months was nearly $200,000 per month; and on the ratio of the increase of the business of the year 1927 over the year 1926, the gross revenue for any one month should aggregate more than $200,000.

Plaintiff avers that any cessation or interference with its business, either pending the determination of the price and the issuance of premiums above set forth, or if permits should be issued and contested by this plaintiff, plaintiff would suffer great and irreparable financial loss.

III.

Plaintiff respectfully states to the Court that the General Assembly of the State of Tennessee has enacted into a law Senate Bill No. 282, and it has received the approval of the Governor, which approval was given on the 8th day of April, 1927. Said bill is entitled "An Act to regulate the gasoline industry; to regulate the fixing and charging of prices of gasoline, and prescribing a method for determining at what prices gasoline dealers may sell gasoline; to prohibit rebate and discrimination; to create and establish a division of the Department of Finance and Taxation to be known as the Division of Motors and Motor Fuels, fixing the duties of the Commissioner of Finance and Taxation and of the Superintendent of such Division with respect to the regulation of sale prices of gasoline, to provide for the issuance of permits to gasoline dealers under the rules and regulations prescribed by the Division of Motors and Motor Fuels; to provide penalties for the violation of this Act; to levy and collect an additional tax on gasoline dealers; and to authorize a judicial review of the orders of the Division of Motors and Motor Fuels."

A copy of said Act is filed as exhibit to this bill and made a part hereof, but need not be copied.

By the terms of the Act itself, it takes effect from and after its passage. Plaintiff respectfully states and shows to the Court certain of the particular provisions of said Act, which vitally affect this plaintiff in the operation of its business.

Under Section 1 of the Act, the Division of Motors and Motor Fuels is created as a part of the Department of Finance and Taxation.

Under Section 2, the Act provides that this Division of Motors and Motor Fuels shall make investigation and collect and record data concerning the manufacture and sale of gasoline, freight rates, differentials in prices to wholesalers and retailers, the cost and expense of production and sale, and various other matters as fully set forth in Section 2 of the Act, all of which data and information shall be available for use by the Commissioner of Finance and Taxation in the regulation of prices at which gasoline may be sold in the State of Tennessee, and permits shall be issued for the sale of gasoline only subject to the approval of the Commissioner of Finance and Taxation, and only at the price fixed and determined by the Commissioner of Finance and Taxation and the Division hereinbefore mentioned.

This section authorizes and embraces the fixing of the prices of gasoline not only to the consumer, but the price at which it shall be sold wholesale or retail—that is to say, it

provides for what may be regarded by the Commissioner of Finance and Taxation as a reasonable differential.

Plaintiff states to the Court that the primary purpose of the creation of this commission, as gathered from the face of the Act itself, is to compel this plaintiff, and all others engaged in the sale of gasoline in the State of Tennessee, to fix such differential between the wholesale and retail prices of gasoline as to protect the business interests of the few persons who are engaged as wholesalers or jobbers, regardless of the effect it may have upon the public generally.

No permit will be issued except to sell in accordance with the terms and conditions, and at the price established by the Commissioner of Finance and Taxation and the Division referred to in the Act under his direction and control.

Under Section 3 of the Act, it is provided that it shall be unlawful for any person, firm, or corporation to engage in the sale of gasoline in Tennessee, wholesale or retail, without his having obtained a permit to do such business in accordance with the provisions of Section 2 of said Act.

It is also provided in said Act, that in order to obtain a permit, plaintiff is required, if it desires to engage in the sale of gasoline in this State, either at wholesale or retail, to set out in its application, as provided in Section 4 of the Act, elaborate details, including, among other things, the statement as to whether it desires to engage in the wholesale business or the retail business, the number and location of the different places in which it intends to operate, the names and addresses of the members of the firm, the style of the firm, and the place or places at which it is intended to do business; if a foreign corporation, the State of its incorporation, its principal place of business, etc., and the name or address of its principal agent or agents in the State of Tennessee; the price or prices at which said dealer is at the time of its application selling gasoline at the different locations where the same is sold; the cost price of such gasoline to the dealer, including the refinery cost, transportation cost, taxes and inspection fees, the cost of distribution, and such other costs and expenses as may enter into the price at which it is proposed to sell such gasoline; the price or prices at which he proposes to sell gasoline as a wholesaler and as a retailer.

It is further provided in Section 5 of said Act, that the Superintendent of the Division of Motors and Motor Fuels must take into consideration all this information, and recommend to the Commissioner of Finance and Taxation the terms and conditions upon which the permit shall be issued, and in fixing the price at which gasoline shall be sold at wholesale and retail. The final power of fixing such terms

and conditions and price is vested in the Commissioner of Finance and Taxation, after a hearing when demanded, as provided in Section 5 of said Act.

It is further provided in this section, that after the Commissioner shall have made his order fixing the price for the sale of gasoline, any applicant aggrieved by the action of the Commissioner, may have the action reviewed in any Chancery Court or Circuit Court in Davidson County, Tennessee, and on such review, the Court may "in its discretion, either supersede or modify said order in such manner and upon such conditions and terms as may appear to be proper."

It is further provided, in Section 6 of the Act, that it shall be unlawful for any person, firm or corporation engaged in selling gasoline at either wholesale or retail, to change his price or prices without applying for and obtaining the consent of the Superintendent of the Division of Motors and Motor Fuels, approved by the Commissioner of Finance and Taxation.

In Section 8 of the Act, it is provided that it shall be unlawful to grant any rebate to any consumer or purchaser of said gasoline, or to sell at any price different from the price filed with the Commissioner of Finance and Taxation and approved by him; or to discriminate in favor of any customer or purchaser in any locality to any extent beyond the difference in freight rates; and it is also provided that it shall be unlawful for dealers to fail to maintain differentials as hereinbefore set forth.

It is provided in Section 9 of the Act, that the Attorney General of the State shall be the law officer who shall represent the State in all proceedings before the Division or Department, and in all judicial proceedings growing out of the orders of said Department and Division.

It appears from the Act itself that the State of Tennessee, in the passage of this Act, is not only undertaking to regulate the price of gasoline to the consumers of the State; not only undertaking to unlawfully exercise the power to control the producers and dealers in gasoline in the disposition of their products except in conformity with the rules and regulations established in accordance with the provisions of this Act, but it has gone further than the effort on the part of any State in regard to the control of private business. It has undertaken, by the provisions for the establishment of differentials in the price of gasoline, which are binding upon all dealers, to make a differential between tank car prices, the wholesale or tank wagon price, and the filling station price, the effect of which is to protect the middleman, and to enable him to make a profit at the ex-

pense of the consumer, notwithstanding the fact that the producers and dealers and vendors of gasoline might be willing to sell to the consumer at a price much less than the price fixed with the provisions made for differentials.

It compels, for instance, this plaintiff, whose business is largely confined to tank wagon sales, to sell to its customers at a fixed and definite price in relation to the tank car prices that may be authorized, although this plaintiff may desire, and frequently would desire, to sell at a lower price, all of which places burdens upon the consumer of gasoline within the State of Tennessee for the exclusive benefit of a particular class—that is, the wholesaler, jobber or middleman.

The Act further destroys the right of contract, which is a property right under the law, and vested in the plaintiff, in regard to the sale and disposition of its products, and particularly the sale and disposition of its principal product —gasoline.

It imposes upon the plaintiff obligations in regard to the management and control and sale of its properties, that are not imposed generally upon all products and commodities of interest to the public at large.

IV.

Plaintiff respectfully states to the Court, that this Act is void and of no effect in that it violates certain rights of the plaintiff vested in it by the Constitution of the State of Tennessee and by the Constitution of the United States.

The Act violates Section 20 of Article 1, of the Constitution of Tennessee, providing that no retrospective law, or law impairing the obligation of contracts, shall be made; and Section 2 of Article 11, providing that nothing in the Constitution shall impair the validity of any debts or contracts, or affect any person or property, or any suits, actions, rights of action, or other proceedings in the Courts of Justice.

Under this Act, any contract that may have been made by the plaintiff in regard to the sale of gasoline before the passage of this Act, at a fixed price, or any contract made by any other dealer in gasoline in the State of Tennessee for the sale of gasoline at a fixed price is impaired, in that unless such price should be approved by the Commissioner of Finance and Taxation as hereinbefore set out, a sale at the contract price would be a penal offense, and would subject this plaintiff and all others engaged in such business in such situations to such penalties and punishment.

Said Act violates Section 8 of Article 1 of the Constitution of Tennessee, which provides that no man shall be disseized

of his freehold, liberties, or privileges or in any manner destroyed or deprived of his life, liberty, or property, except by the judgment of his peers or the law of the land, in that it deprives this plaintiff of the right to the disposition of his property upon such terms as it might see fit to dispose of it. It deprives this plaintiff of the right of contract, and further, it is class legislation, in that it singles out the gasoline business not only in regard to the fixing of prices for the sale of gasoline, but in providing for differentials in the prices as between sales to retailers and sales to wholesalers, thus protecting the middleman engaged in the sale of gasoline, while all other middlemen engaged in the sale of other commodities are left without protection. It is respectfully shown to the Court that the Courts of the State have interpreted this section of the Constitution of Tennessee as to prohibit unreasonable, arbitrary classifications, and the imposition of burdens and restrictions upon one class of business that are not imposed upon all classes of business, where there is no sound or reasonable distinction between them.

And for the same reason, it violates Section 8, Article 11 of the Constitution of Tennessee, which provides that the legislature shall have the power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land, nor to pass any law granting to any individual or individuals rights, privileges, immunities or exemptions other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law.

Plaintiff further avers that the Act violates Sections 1 and 2 of Article 2 of the Constitution of Tennessee, which provides that the powers of Government shall be divided into three distinct departments—the legislative, executive and judicial—and that no person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the other, except in the cases therein directed or permitted, in that as heretofore set forth, the Act provides that on appeal from the action of the Commission, under the terms of this Act, the action of the Commission may be reviewed in any Chancery or Circuit Court of Davidson County, Tennessee, and that in such procedure, the Court where the appellate proceeding is pending may "in its discretion, either supersede or modify said order in such manner and upon such conditions and terms as may appear to be proper."

By this provision in the Act, there is vested in the Court, or in the Judicial Department of the State, the right to exercise the legislative power of the making of rates.

V.

Plaintiff avers that the Act violates the rights of this plaintiff, and all others engaged in similar business, granted to it and to them by certain provisions of the Constitution of the United States. It violates that provision of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

It violates this provision of the Fourteenth Amendment to the Constitution of the United States in that it impairs, and practically destroys the plaintiff's right of contract in reference to its own property, without any reasonable ground or basis of such action. It takes plaintiff's property without due process of law, and denies it the equal protection of the law, in that it applies certain limitations and restrictions to this plaintiff, that are not placed generally upon the business of other persons and corporations engaged in selling commodities in the State of Tennessee; and further, because the sale of gasoline is not impressed with any public interest such as would justify legislative control as to prices; and, finally, because there is no justification for a law which limits and restricts plaintiff and others engaged in the sale of gasoline in the State of Tennessee in such a way as to protect the middlemen, regardless of the interest of this plaintiff and others engaged in the sale of gasoline, on the one side, and the public on the other.

It violates Section 10 of Article 1 of the Constitution of the United States, which provides that no State shall pass a law impairing the obligation of contracts, for the same reasons as are set out in that part of this bill which states that it violates Section 20, Article 1, and Section 2 of Article 11 of the Constitution of the State of Tennessee; and because it, also, in requiring a permit for the sale of gasoline in the State, whether intrastate or interstate, imposes a burden upon interstate commerce contrary to the provisions of Section 8, paragraph 3, of Article 1, of the Constitution of the United States, vesting in Congress the exclusive right to regulate commerce among the several States.

VI.

Plaintiff respectfully states to the Court that it has large property rights involved in the interpretation and application of this law; that the amount involved to this plaintiff exceeds three thousand dollars; that it has no adequate remedy at law, and failure to comply with the provisions of

this Act, which plaintiff avers is unconstitutional and void, would subject it to numerous suits, both civil and criminal, and a multiplicity of litigation would arise that would put this plaintiff to great embarrassment, expense, and delay, in the ascertainment of its rights.

Manifestly quite a period of time will elapse before any proper determination can be made, under the provisions of the law, of the facts upon which the issuance of a permit must be based, and all this time it will be unlawful for the plaintiff, or any one else, to sell gasoline. As a result of the statute, therefore, there must necessarily be a complete cessation of the sale of gasoline in Tennessee for a long period of time. This would not only be oppressive and embarrassing to the people of Tennessee, but exceedingly embarrassing and expensive to plaintiff, costing the plaintiff large sums of money, running into the hundreds of thousands of dollars. Its stations would be idle, and its business would be stopped.

In order to avoid this, it would be necessary for plaintiff to disregard this statute, and subject itself to indictment and prosecution for every sale that is made throughout the length and breadth of the State. Thousands of misdemeanor cases could be brought against it, and in addition, it would be likely to be interfered within its rights by the injunctive process issued by the State.

The Act provides no power, either in the Commissioner or Governor, to suspend a portion of the Act until the investigation provided for in the Act is made.

As will appear from what has already been shown, the effect of the Act in question, if its operation is not immediately restrained by order of this Court, will be to work irreparable injury upon plaintiff. Plaintiff is engaged in business throughout the State, with annual sales of gasoline amounting to millions of gallons, the money lost to it between the time of the taking effect of the Act and the time of the operation of the Act will amount to hundreds of thousands of dollars.

Any violation of the Act, as heretofore stated, will subject plaintiff to indictment for misdemeanor, and to penalties and forfeitures of the severest kind. The penalties and forfeitures incurred by disregarding this Act are so severe, that plaintiff could not afford to await the test of the constitutionality of the Act through the ordinary method, as by defending an indictment for misdemeanor, or an injunction proceeding brought by the State or by any other person.

Plaintiff is advised that it has the right to file this bill to enjoin the officers of the State of Tennessee named as

defendants hereto, and their agents, and attorneys from proceeding against plaintiff under this Act.

PREMISES CONSIDERED, plaintiff prays—

1. That proper process issue, requiring the parties named as defendants to answer this bill, but not under oath, their answers under oath being waived.

2. That defendants and each of them, and all other persons, be temporarily and permanently restrained and enjoined from proceeding or attempting to proceed to enforce this act against plaintiff in any respect, and from interfering with plaintiff in any respect, and from interfering with plaintiff in the conduct of its business on the ground that plantiff has not complied with the act aforesaid, and from instituting any suit or proceedings against the plaintiff for the enforcement of the penalties and/or forfeitures provided for in said act or for the enforcement of the penalties and/or forfeitures provided by any other law of Tennessee for violations of said act, and from interfering in any way with plaintiff's conduct of its business as heretofore conducted.

3. That on the final hearing, said Act be declared unconstitutional and void, and that said temporary injunction be made permanent, and that plaintiff have all such other, further and general relief as the premises or proof may warrant and equity require.

4. That because immediate and irreparable injury will be done to plaintiff unless the enforcement of said act is enjoined and restrained at once and pending the hearing of plaintiff's application for said preliminary injunction, plaintiff further prays that upon the filing of this bill, a temporary restraining order issue, enjoining and restraining the said defendants as hereinabove prayed until the hearing and determination of plaintiff's application for a preliminary injunction.

This is the first application for an injunction and restraining order in this case.

KEEBLE, SEAY, STOCKELL & KEEBLE,
Solicitors for Plaintiff.

STATE OF TENNESSEE,
COUNTY OF DAVIDSON.

I, Jno. B. Keeble, having been duly sworn, make oath and say, that I am now, and have been for more than a year past, attorney of The Texas Company for the State of Tennessee and that as such attorney I am familiar with the conduct of business of said company in Tennessee; that I have read the foregoing bill, and the statements therein

made are true to the best of my knowledge, information and belief.

JNO. B. KEEBLE.

Subscribed and sworn to before me, this 8th day of April, A.D., 1927.

KATIE E. GERRATY,
Notary Public.

Exhibit to Original Bill

SENATE BILL No. 282.

(By McKnight, Wiggs and Miller.)

AN ACT to regulate the gasoline industry; to regulate the fixing and charging of prices of gasoline and prescribing a method for determining at what prices gasoline dealers may sell gasoline; to prohibit rebate and discrimination; to create and establish a Division of the Department of Finance and Taxation to be known as the Division of Motors and Motor Fuels, fixing the duties of the Commissioner of Finance and Taxation and of the Superintendent of such Division with respect to the regulation of sale prices of gasoline; to provide for the issuance of permits to gasoline dealers under rules and regulations prescribed by the Division of Motors and Motor Fuels; to provide penalties for the violation of the Act; to levy and to collect an additional tax on gasoline dealers; and to authorize a judicial review of the orders of the Division of Motors and Motor Fuels.

SECTION 1. Whereas, gasoline is now in general use as a motor fuel, in both public and private transportation, and is necessary in carrying on the commerce of the people of this State; and,

Whereas, the business of selling and marketing gasoline has become demoralized because of the attempt on the part

of some dealers to monopolize the business and destroy competition, and because of the unfair and improper practices in the trade, it has become necessary for the State to control and regulate the business of selling and marketing gasoline in order to prevent the destruction of competition and to prevent extortionate prices and to preserve both public and private commerce and transportation,

It is therefore hereby declared that the sale and marketing of gasoline in this State is impressed with public use,

Therefore, Be it enacted by the General Assembly of the State of Tennessee, That there is hereby established a Division of the Department of Finance and Taxation to be known as the Division of Motors and Motor Fuels, which said Division shall be in charge of a Superintendent to be named and appointed as other Superintendents of Divisions of the Department of Finance and Taxation are provided by law.

SEC. 2. *Be it further enacted,* That it shall be the duty of the Commissioner of Finance and Taxation to require the Division of Motors and Motor Fuels, through the Superintendent and other employes of said Division, to make investigations and to collect and record data concerning the manufacture and sale of gasoline; the cost incident to the refining processes at the refineries to the dealers in Tennessee and elsewhere, freight rate, differentials in prices to the wholesale dealer and the retail dealer; the cost and expense incident to the sale of gasoline; the methods employed by manufacturers and dealers in the distribution of gasoline to consumers, and such other data and information as will or might be material in ascertaining and determining what prices would be fair and reasonable to be paid for gasoline by wholesale dealers, retail dealers and consumers. All such data and information shall be available for use to the Commissioner and the Division aforesaid in the regulation of prices at which gasoline may be sold in the State of Tennessee, and shall be available for the inspection and information of the public, and the said Commissioner is authorized, when deemed necessary, to make public by publication or otherwise the information secured hereunder. It shall be the duty of the Superintendent of the Division of Motors and Motor Fuels to issue permits to dealers, subject to the approval of the Commissioner of Finance and Taxation, authorizing the sale by wholesale or retail of gasoline in this State at prices fixed and determined as hereinafter provided, and to perform such other duties as may be prescribed by subsequent sections of this Act.

SEC. 3. *Be it further enacted,* That it shall be unlawful for any person, firm or corporation to engage in the sale

of gasoline in intrastate commerce in this State, either at wholesale or retail, without first having obtained a permit to do such business, signed by the Superintendent of the Division of Motors and Motor Fuels and approved by the Commissioner of Finance and Taxation, and no permit shall be issued to any firm, person, or corporation to engage in the sale of gasoline in intrastate commerce unless and until such dealer shall make application therefor in accordance with the regulations of this Act, and in compliance with all the requirements and provisions hereof.

SEC. 4. *Be it further enacted*, That every person, firm, or corporation, desiring to engage in the sale of gasoline in intrastate commerce in this State, either at wholesale or retail, shall make application to the Superintendent of the Division of Motors and Motor Fuels therefor, and shall be set out in said application the following information, to-wit:

(a) Whether he proposes to do a wholesale or retail business, or both; and if a wholesale business, the number and location of the different places at which he intends to operate; and if a retail business, the number and location of the different service stations and pumps he intends to operate.

(b) If the applicant is an individual, give his name and address; if a partnership, the names and addresses of the members of the firm, the style of the firm and the place or places at which it is intended to do business; if a domestic corporation the location of its principal office and the names and addresses of its principal officers; if a foreign corporation, the State of its incorporation, its principal places of business in the State where chartered, and its principal place of business in this State, as well as the names and addresses of its principal officers, and the name and address of its principal agent or agents in this State.

(c) The price or prices at which said dealer is at the time of the application selling gasoline at the different locations where he sells the same.

(d) The cost price of such gasoline to said dealer, including the refinery cost, transportation cost, taxes and inspection fees, the cost of distribution, and such other costs and expenses as may enter into the price at which it is proposed to sell such gasoline.

(e) The price or prices at which he proposes to sell gasoline as a wholesaler and as a retailer.

(f) Such other information as may be prescribed by the Superintendent.

SEC. 5. *Be it further enacted*, That it shall be the duty of the Superintendent of the Division of Motors and Motor Fuels to take into consideration all the information fur-

nished as provided by the previous section, and if the price or prices at which said applicant proposes to sell gasoline does not exceed a reasonable profit to the dealer, after figuring the cost to the dealer, freight and expenses in marketing, and making a proper differential between the wholesale and retail prices, and the same is in the interest of the public, to issue to said applicant a permit authorizing him to sell gasoline in the State of Tennessee; provided, however, such permit must first be approved by the Commissioner of Finance and Taxation.

If, however, the price at which any applicant proposes to sell gasoline in Tennessee shall be by such Superintendent of Motors and Motor Fuels deemed unfair and unreasonable in view of the information which by the previous sections is required to be taken into consideration, then it shall be his duty to fix and name a price or prices at which gasoline may be sold by the said applicant, and to notify said applicant thereof in writing, stating the reasons for his action in this respect. In the event the applicant is dissatisfied with the action of the Superintendent, it shall be his duty, before engaging in the sale of gasoline in this State, to notify the Commissioner of Finance and Taxation in writing, within ten days after receiving notice of the action of the Superintendent, of his dissatisfaction, and shall in said notice set forth specifically the objections which he has to the ruling of the Superintendent and the reasons upon which he relies for a review or correction of the action of the Superintendent, and shall demand of the Commissioner that he fix a time and place at which the Commissioner will hear proof, limited to the grounds and reasons assigned by the applicant for his dissatisfaction to the action of the Superintendent. Thereupon it shall be the duty of the Commissioner to fix a time and place and afford to the applicant an opportunity to be heard with respect to the grounds of his complaint by the introduction of proof, if desired. The time and place of such hearing will be named by the Commissioner, which shall not be more than five days from the date of the filing of the complaint with him, notice of such time and place to be given to the applicant. It shall likewise be the duty of the Commissioner to give to the Governor and to the Attorney-General of the State, and to all other applicants for permits to whom permits have not been issued at the time, notice of the complaint of any applicant, and the time and place at which such said complaint will be heard. Any other person interested in the price of gasoline, either as a dealer or consumer, may likewise be heard upon the complaint of any applicant under such rules and regulations as the Commissioner may prescribe,

provided that said Commissioner may give notice by publication in daily newspapers published in at least two of the four larger cities of the State. After such hearing the Commissioner shall decide, upon taking into consideration the facts and information hereinbefore referred to, and such other facts as may be relevant, whether or not a permit will be issued to the applicant to sell gasoline at the price or prices proposed, or, if not, at what price a permit will be issued, giving notice to the applicant thereof.

Any applicant aggrieved by the action of the Commissioner may file a petition for the purpose of having said action reviewed in any Chancery Court or Circuit Court of Davidson County, Tennessee, provided notice of his intention to file a petition for review has been served on the Commissioner five days in advance of filing. Upon receiving notice of the intention of an applicant to file a petition for review, as aforesaid, it shall then be the duty of the Commissioner to cause all of the proceedings had before him on the application to be reduced in writing, and verified by him as being correct, so that when such petition has been filed and notice thereof served upon him (and the petitioner shall cause such notice to be served), the Commissioner shall, within five days, then file with the Clerk of the Court where said suit is brought a transcript of all the proceedings had before him, and which is sought to be reviewed, and said transcript duly verified shall constitute all the record, and shall be the basis of the action of the Court of Review; provided, that the court may, in its discretion, upon good cause shown, allow either side to file additional proof. No order of the Commissioner shall be superseded by said Court before final hearing, unless after five days' notice to the Commissioner it shall appear to the Court at a regular hearing, or at Chambers upon proper motion, that irreparable injury will result to the petitioner on the continuance of said order, and that no irreparable injury will result from a dissolution or modification thereof; in such event the Court may, in its discretion, either supersede or modify said order in such manner and upon such conditions and terms as may appear to be proper.

SEC. 6. *Be it further enacted,* That it shall be unlawful for any person, firm or corporation, engaged in selling gasoline in Tennessee, at either wholesale or retail, to change his price or prices without applying for and obtaining the consent of the Superintendent of the Division of Motors and Motor Fuels, approved by the Commissioner of Finance and Taxation. Any dealer desiring to change his price shall file his application with the Commissioner at least five days before the proposed change in prices, and shall set

out in his said application the reasons for said change, and shall show:

(a) That conditions exist, or have arisen, justifying such changes, and what such conditions are, which show that the new price to be charged is not unfair to the public and not unfair to other dealers.

In determining whether such change shall be permitted the same procedure shall be had as hereinbefore prescribed with respect to the issuance of the original permit, and the same remedies shall apply to anyone aggrieved at the action of the Commissioner as is afforded to one aggrieved by the action of the Commissioner upon an original application, including the right of review to any Chancery or Circuit Court of Davidson County, Tennessee.

SEC. 7. *Be it further enacted,* That either the Attorney-General of the State, or any other person interested, whether as dealer or consumer, may file with the Superintendent of the Division of Motors and Motor Fuels objection to any price or prices being maintained by any dealer as herein defined, and may show in his petition setting up said objection that the price or prices are extortionate or unfair to the public, or to any other dealer, as above set out, and after due notice to such dealer, and after hearing proof in the manner and form hereinbefore prescribed for the procedure of the Commissioner of Finance and Taxation, and in such manner as will give both sides proper opportunity to be heard, the Commissioner shall, if the facts warrant such action, issue an order to the said dealer whose prices are complained of, restraining him from selling at the price complained of, or the Commissioner may make in said order any such conditions or limitations as under the facts will do justice to said dealer and protect the public and legitimate competition, the Commissioner at all times taking into consideration those facts and elements hereinbefore set forth as constituting a fair and reasonable price in the interest of the public. Any other person aggrieved at the action of the Commissioner in this respect shall be entitled to the same right of objection and review by the Courts, and under the same procedure as is hereinbefore provided in the case of original applications for permits.

SEC. 8. *Be it further enacted,* That it shall be unlawful for any person, firm or corporation, engaged in intrastate wholesale or retail gasoline business in Tennessee to grant any rebate to any customer or purchaser of said gasoline from any dealer, or to sell to any such purchaser or customer at a price different from that filed with the Commissioner of Finance and Taxation, or to grant any concession or gratuity, directly or indirectly, to any customer or pur-

chaser for the purpose of inducing said purchaser or customer of said dealer to purchase, use or handle the gasoline of said dealer; and it shall be unlawful for any person, firm or corporation engaged in intrastate wholesale or retail sale of gasoline in Tennessee to discriminate against or in favor of any customer or purchaser of said dealer by selling at a different price to said purchasers in different localities in Tennessee, or to different purchasers in the same locality, provided the dealer may take into consideration the difference in freight rates to different localities, and provided further, that dealers shall maintain proper differentials between wholesale and retail prices as such differentials may be fixed and determined by the Superintendent of the Division of Motors and Motor Fuels with the approval of the Commissioner of Finance and Taxation. And it shall also be unlawful for any person, firm or corporation to bring about an unreasonable or unfair increase in the refinery prices of gasoline to dealers in Tennessee, or who shall aid or conspire, combine or confederate with others in aiding to bring about such unreasonable and unfair increase in such refinery price.

No firm, person, or corporation who violates any of the provisions of this Section shall be entitled to a permit to engage in the wholesale or retail or intrastate sale of gasoline. The Governor, the Attorney-General of the State, or any person interested in the price of gasoline, whether dealer or consumer, may upon petition file with the Commissioner of Finance and Taxation complaint against any person, firm or corporation as being guilty of a violation of the provisions of this Section, and if such complaint be filed with the Commissioner, properly sworn to and verified, it shall be the duty of the Commissioner to give notice to the dealer whose conduct is complained of and afford a hearing upon notice to all persons concerned. If the dealer complained of is found to be guilty of the charges by the Commissioner, then it shall be his duty to refuse to issue or cancel his permit. Any investigation had by the Commissioner under the provisions of this Section shall be held and conducted in the same manner as hereinbefore provided for complaints at the action of the Commissioner upon original applications, and the same remedies shall be afforded to those aggrieved as are hereinbefore afforded to persons aggrieved by the action of the Commissioner with respect to original applications for permits.

SEC. 9. *Be it further enacted*, That the Attorney-General of the State, or some assistant Attorney-General designated by him for said duty, shall be the law officer of the Division of Motors and Motor Fuels and the Commissioner of Fi-

nance and Taxation and shall represent the public in all proceedings before the said Division or Department, and in all judicial proceedings growing out of the orders of said Department and Division.

SEC. 10. *Be it further enacted*, That before any person, firm or corporation shall obtain a permit to deal in gasoline, either at wholesale or retail, in this State, he shall pay a special permit tax, which shall accompany the application for permit, as follows:

(a) For each place so conducted for the wholesale marketing of gasoline, $10.00 per annum;

(b) For each retail service station or curb pump, $1.00 per annum.

This tax shall be in addition to all other license, inspection or ad valorem taxes otherwise provided by law, and shall be kept as a special maintenance fund to aid in defraying the expenses of the Motors and Motor Fuel Division of the Department of Finance and Taxation.

SEC. 11. *Be it further enacted*, That the term "gasoline," as used in this Act, means and includes:

(a) The volatile substance produced from petroleum, natural gas, oil shale or coal heretofore sold under the name of gasoline.

(b) Any volatile substance or product less than 112 Fahrenheit Flash Test when tested in a manner approved by the U. S. Bureau of Mines, derived wholly or in part from petroleum, natural gas, oil shale or coal.

(c) Benzol and/or any other volatile substance used wholly or in combination with gasoline as a liquid fuel.

SEC. 12. *Be it further enacted*, That if any section or provision of this Act shall be held to be invalid this shall not affect the validity of other sections or provisions hereof.

SEC. 13. *Be it further enacted*, That this Act take effect from and after its passage, the public welfare requiring it.

Passed April 5, 1927.

HENRY H. HORTON,
Speaker of the Senate.

SELDEN MAIDEN,
Speaker of the House of Representatives.

Approved: April 8, 1927.

AUSTIN PEAY, *Governor.*

AFFIDAVIT OF AMOS L. BEATY.

(Filed May 20, 1927)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.

AMOS L. BEATY, being duly sworn, says:

That he is now, and has been since March 16, 1926, the Chairman of the Board of Directors of The Texas Company; that on April 19, 1927, the properties and business of The Texas Company, a corporation of Texas, incorporated in 1902, were transferred to The Texas Company, a corporation of Delaware; that from 1920 to 1926, he was President of The Texas Company, and for the past fourteen years has been a member of the Board of Directors of said Company, and also of its Executive Committee; that the business of the company and its general policies are controlled by its Board of Directors, and that subject to the control of the Board of Directors the Executive Committee and officers of the Company formulate and execute the policies which have been determined.

That affiant is familiar with the policies which have been formulated and states that no policy or line of conduct is carried on without his knowledge; that The Texas Company does not at this time have and never has had any contract, agreement, or understanding of any kind or character whatsoever with any other company, person firm or association engaged in the petroleum industry in any way fixing or controlling prices, or restricting production of petroleum products, or distributing territory for business purposes.

That the prices at which this complainant sells gasoline and its other products in the State of Tennessee, as elsewhere, is fixed by it on the basis of economic and competitive conditions and without contract, agreement, or understanding of any sort or character whatsoever with any other company, person, firm or association.

Affiant states that The Texas Company is engaged in each of the four principal subdivisions of the petroleum industry, to-wit: (1) producing; (2) transporting; (3) refining and manufacturing; and (4) marketing.

Affiant states that there is no company, firm, person or association or any combination thereof having a monopoly of the oil industry or any of its branches. That upon information and belief in the year 1926, within the United States, there were more than 4,000 companies, persons, firms, or associations engaged in the production of crude oil; more than 100 engaged in the transportation thereof; more than 500 engaged in refining and manufacturing petro-

leum products, and more than 3,000 in marketing such products.

Affiant states, upon information and belief that The Texas Company does not hold or control either in the State of Tennessee or in the United States as much as nine per cent of the business of the petroleum industry or any of its branches.

The operations of this complainant under each and all of the four branches of its business are covered by economic and competitive conditions, without any contract, agreement, or understanding of any kind whatsoever with any other company, person, firm, or association engaged in the industry fixing or controlling prices, or restricting production of petroleum products, or distributing territory for business purposes.

(Signed) AMOS L. BEATY.

Sworn to before me and subscribed in my presence this 28th day of April A.D. 1927.

WM. G. MCCONKY,
Notary Public.

(Seal)

AFFIDAVIT OF R. C. HOLMES.

(Filed May 20, 1927)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.

R. C. HOLMES, being duly sworn, says:

That he is, and has been since March 16, 1926, the President of The Texas Company; that on April 19, 1927, the property and business of The Texas Company a corporation of Texas, incorporated in 1902, were transferred to The Texas Company, a corporation of Delaware; that affiant has been a director of said company since 1906, and a member of the executive committee since 1919; that the business of the company and its general policies are controlled by its Board of Directors, and that subject to the control of the Board of Directors, the Executive Committee and

officers of the company formulate and execute the policies which have been determined;

That affiant is familiar with the policies which have been formulated and states that no policy nor line of conduct is carried on without his knowledge; that The Texas Company does not at this time have, and never has had any contract, agreement or understanding of any kind or character whatsoever with any other company, person, firm, or association engaged in the petroleum industry in any way fixing or controlling prices or restricting production of petroleum products or distributing territory for business purposes;

That the price at which this complainant sells gasoline and its other products in the State of Tennessee, as elsewhere, is fixed by it on the basis of economic and competitive conditions and without contract, agreement or understanding of any sort or character whatsoever, with any other company, person, firm or association.

Affiant states that The Texas Company is engaged in each of the four principal subdivisions of the petroleum industry, to-wit: (1) producing; (2) transporting; (3) refining and manufacturing; and (4) marketing.

Affiant states that there is no company, person, firm, or association or any combination thereof, having a monopoly of the oil industry or any of its branches; and states, upon information and belief, that in the year 1926, within the United States there were more than four thousand companies, persons, firms, or associations engaged in the production of crude oil; more than one hundred engaged in the transportation thereof; more than five hundred engaged in refining and manufacturing petroleum products and more than three thousand engaged in marketing such products. That The Texas Company does not hold or control, either within the State of Tennessee or in the United States, as much as nine per cent of the business of the petroleum industry or any of the four branches thereof.

The operations of this complainant under each and all of the four branches of its business are governed by economic and competitive conditions and without any contract, agreement, or understanding, of any kind whatsoever with any other company, person, firm or association engaged in the industry of fixing or controlling prices or restricting production of petroleum products, or distributing territory for business purposes.

(Signed) R. C. HOLMES.

Sworn to before me and subscribed in my presence this 28th day of April, 1927.

(Seal) WM. G. MCCONKY, *Notary Public.*

AFFIDAVIT OF W. W. BRUCE.

(Filed May 20, 1927)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.

W. W. BRUCE, being duly sworn, says:

That he is now and has been since April 7, 1925, a Vice-President of The Texas Company in charge of sales; that since March 16, 1926, he has been a member of the Company's Board of Directors; that on April 19, 1927, the properties and business of The Texas Company, a corporation of Texas, incorporated in 1902, were transferred to The Texas Company, a corporation of Delaware. Affiant states that the business of The Texas Company and its general policies are controlled by its Board of Directors, and that subject to the control of the Board of Directors, the Executive Committee and the officers of the Company formulate and execute the policies which have been determined.

Affiant states that The Texas Company does not produce or refine petroleum products in the State of Tennessee, but is engaged in the distribution of its products therein. He states that he is familiar with the sales policies which have been formulated, and says that no sales policy or practice is carried on without his knowledge; that The Texas Company does not at this time have, and never has had any contract, agreement or understanding of any kind or character with any other company, person, firm, or association engaged in the petroleum industry in any way fixing or controlling prices, or restricting production of petroleum products or distributing territory for business purposes.

That the price at which this complainant sells gasoline and its other products in the State of Tennessee, as elsewhere, is fixed by it on the basis of economic and competitive conditions, and without contract, agreement or understanding of any sort or character whatsoever with any other company, person, firm, or association.

Affiant states that there is no company, firm, person, or association or any combination thereof having a monopoly of the oil industry or any of its four branches, to-wit: production, transportation, refining, and marketing.

Upon information and belief, affiant stated that The Texas Company does not hold or control as much as nine per cent of the business of the petroleum industry or any of the four branches thereof either in the State of Tennessee or in the United States.

W. W. BRUCE.

Sworn to and subscribed in my presence this 28th day of April, A.D. 1927.

(Seal) WM. G. MCCONKY, *Notary Public.*

RESTRAINING ORDER.

(Entered April 9, 1927—GORE, *Judge*)

This cause came on this day to be heard on the application of the plaintiff for a temporary restraining order enjoining and restraining the defendants as prayed in the original bill, and on the entire record herein and as argued by counsel.

And the Court, having considered the same, and being of opinion therefrom, that such restraining order should be granted, it is now accordingly ordered that the defendant and each of them, their agents, assistants, attorneys, and subordinates in office, and all persons, acting by, through or under them, be and they are hereby, restrained and enjoined from proceeding to enforce against the plaintiff the Act of Tennessee passed April 8th, 1927, known as Senate Bill 282, a copy of which is attached to the Original Bill as Exhibit "A," in any respect, and from interfering with the plaintiff in the conduct of its business on the ground or for the reason that plaintiff has not complied with said act; and from instituting any suit or proceeding against plaintiff for the enforcement of the penalties and/or forfeitures provided in said act, or for the enforcement of the penalties and/or forfeitures provided by any other law of Tennessee for violations of said act.

It is further ordered that this order shall remain in effect only until the plaintiff's application for an interlocutory injunction has been heard and determined, and that said application for an interlocutory injunction shall be heard at Nashville on Saturday, April 16, 1927, at 10 o'clock A.M.

It is further ordered that a copy of this order be served upon each of the defendants, and that five days notice of the hearing of said application for said interlocutory be given to each of the defendants and also to the Governor of Tennessee.

GORE, *Judge*.

MOTION TO DISMISS, AND ANSWER OF DEFENDANTS.

(Filed April 30, 1927)

The motion to dismiss the bill in the above entitled cause, and the Answer thereto of defendants, Frank S. Hall, Commissioner of Finances and Taxation of the State of Tennessee, L. D. Smith, Attorney General of the State of Tennessee, and R. M. Atkinson, District Attorney General of the State of Tennessee, for the Tenth Circuit, embracing Davidson County, to said bill filed against them in this court on the 9th day of April, 1927.

Come the defendants and move to dismiss plaintiff's bill upon the grounds following, to-wit:

(1) There is no equity upon the face of said bill.

(2) To the extent said bill is predicated upon any alleged impairment of plaintiff's claimed contract rights by the Act of the Tennessee Legislature, set forth in and made a part of said bill, plaintiff wholly fails to aver and set out any contract or agreement existing between it and any person, firm, or corporation which will be unlawfully affected or impaired by said Act within the meaning of the provisions of either the State or Federal Constitutions referred to and relied upon in said bill.

(3) The plaintiff, as alleged by it, is a foreign corporation, and is entitled to carry on its intra-state business within the State of Tennessee only by such permission or license as said State may deem, from time to time, proper to impose upon it, and said Act, duly passed by the General Assembly of the State of Tennessee, within its just powers, is a valid enactment prescribing the terms and conditions upon which plaintiff may continue to carry on and operate its intra-state business within said State, and if plaintiff does not desire to continue such intra-state business by complying with said Act, said plaintiff may withdraw or discontinue such business without incurring any of the penalties prescribed by said Act.

(4) Said Act of the State of Tennessee is a valid and constitutional enactment within the sovereign police powers of said State, and is not in contravention of, or repugnant to any provision of either the State or Federal Constitutions referred to and relied upon in plaintiff's bill.

(5) The facts averred in the bill, and other facts or conditions of general and common knowledge, of which the Court will take notice, show that gasoline usable and necessary, under existing conditions, for power, light, heating and other purposes, necessary to the comfort, welfare and prosperity of the people of Tennessee, has been devoted by

plaintiff and other like dealers to a public use, and is affected with a public interest, and is, therefore, subject to regulation by the State of Tennessee.

(6) That in so far as plaintiff seeks to enjoin the defendants, and particularly the defendants L. D. Smith, Attorney General of Tennessee, and R. M. Atkinson, District Attorney General of Tennessee, from enforcing the provisions of Section 8 of said Act, defendants say that the plaintiff is not entitled to any such injunction or restraining order because it is within the power of the State to prohibit concessions, rebates, gratuities and other practices, the necessary result of which is to destroy fair and reasonable competition and to bring about unjust discrimination between users and purchasers of gasoline.

(7) This Court cannot in the exercise of its equity jurisdiction restrain and enjoin the execution of the Act challenged in the plaintiff's bill, for the reasons that the officials named therein, charged with the enforcement of the Act, have taken no action with a view to determining the regulation or fixing of prices of gasoline that gasoline dealers may charge to the purchasing public, and until this shall have been done, and proved to be unreasonable in the sense of the law, there is no ground of equity jurisdiction under which this Court can grant the injunction prayed for; and, further, it is a necessary condition in law and equity, before invoking the jurisdiction of this court on its equity side, that the plaintiff shall have exhausted the procedure outlined in the Act itself for determining the prices at which gasoline may be sold by the dealer.

(8) This Court has no jurisdiction to grant the injunction prayed for in the bill to prevent the execution of this Act, for the reason that no case is made by the bill that shows that any violation of the property rights of the plaintiff, that may be alleged to result from the execution of this Act, cannot be fully compensated by an action at law. And plaintiff has no standing in this Court unless the facts stated, as a ground for relief by way of injunction, show some distinct head of equity jurisprudence under which the relief asked for by way of injunction can be granted, on the ground that if not granted there is no other adequate relief by an action at law.

(9) Section 1 of the Act in question declares a fact of common knowledge in stating that "Gasoline is now in general use as a motor fuel, in both public and private transportation, and is necessary in carrying on the commerce of the people of this State;" that "the business of selling and marketing gasoline has become demoralized because of the attempt on the part of some dealers to

monopolize the business and destroy competition, and because of the unfair and improper practices in the trade, it has become necessary for the State to control and regulate the business of selling and marketing gasoline in order to prevent the destruction of competition and to prevent extortionate prices and to preserve both public and private commerce and transportation." Following this declaration the said Act in the said first section enacts thus: "It is therefore hereby declared that the sale and marketing of gasoline in this State is impressed with public use." This Court must assume that this condition of marketing and selling gasoline existed at the time this statute was enacted and became effective on April 8th, 1927, and before the Court can entertain jurisdiction of this cause the plaintiff must allege in the statement of its grievances facts that show that it is not engaged in any practices having the effect condemned in said Act, in this its first section, and therefore states no ground for invoking the jurisdiction of this court for an injunction to prevent the execution of said Act.

Now, not waiving the benefit of their motion to dismiss, but relying thereon, these defendants for answer to plaintiff's bill, in so far as they are advised it is necessary or material for them to answer, say:

I.

If the plaintiff is a corporation organized under the laws of the State of Texas, and is and has been for a number of years domesticated by compliance with the statute laws of the State of Tennessee for the doing of the business for which it was chartered in said State, these are facts which rest upon the plaintiff to show which it can easily do if true, and therefore are not admitted, but plaintiff is put to the proof of the same as alleged.

The defendants deny that the plaintiff has continuously for several years been qualified under the law of the State of Tennessee to be doing business in the State, because of the connection of the plaintiff with the Standard Oil Company, hereinafter referred to, and by reason of the conduct of the Standard Oil Company, to be stated hereinafter, in which the plaintiff has been connected and has co-operated with the said Standard Oil Company prior to the enactment of the said Act for a long period of time, and in which acts and conduct, in violation of the law of the State, affecting the business of marketing and selling oil and gasoline in Tennessee, it was connected with and participated in at

the time of the passage of said Act, and at the time it filed this bill.

That this Court may have an accurate and clear understanding of the condition of the petroleum industry and trade existing in Tennessee at the time of and long before the enactment of the Act in question, and which still exists, which was brought about by the plaintiff and other companies and interests linked and allied with it and the Standard Oil Company, or Standard Oil group of companies, hereinafter to be mentioned, the defendants deem it necessary to an orderly understanding of this case to make a statement of certain facts connected with such industry and trade that have occurred in this State, and the affects of which are still productive and efficient in controlling the prices of petroleum products, including gasoline, to the great wrong and prejudice of the public by forcing it to pay unreasonable and extortionate prices for gasoline to be used in transportation and all other activities necessarily connected with the commerce of the State and the business and social interests of the people of the State. These particular facts, which are alleged to be true in substance and in fact, are as follows:

That during and prior to the year 1906, the Standard Oil Company of Kentucky, (a corporation by that name under the laws of the State of Kentucky) was doing business in the State of Tennessee, and in the early part of said year, or the latter part of 1905, said Standard Oil Company of Kentucky, with certain of its representatives, officials, or agents, were indicted in the Circuit Court of Sumner County, in the State of Tennessee, for violating Chapter 140 of the Acts of 1903, commonly known as and called "The Anti-Trust Law" of Tennessee; and in and by said indictment it was charged that said Oil Company and its officials, employees, or representatives had entered into a conspiracy for the purpose of lessening and destroying full and free competition in the sale of coal oil in the State of Tennessee, and in due course said Oil Company and its representatives were placed on trial and convicted of violating the terms and provisions of said anti-trust law, and the said Oil Company was fined Five Thousand Dollars, and one of the individual defendants was fined three thousand dollars, and judgment having been entered against said defendants they appealed to the Supreme Court of Tennessee, where in due course their appeal was heard upon the transcript of the record from the Circuit Court of Sumner County, with the result that it was held by said Supreme Court that said Oil Company and C. E. Holt, one of its employees, had been guilty of the conspiracy charged, and the judgment against

Holt was affirmed, but the Supreme Court of Tennessee held, sustaining the constitutionality of the anti-trust law, that the remedy against the offending corporation was not by fine, to which it was not subject, but a proceeding to oust it from doing business in the State, with the result that the judgment of the Circuit Court of Sumner County imposing a fine upon said Oil Company was reversed.

The opinion of the Supreme Court of Tennessee, delivered during its December term 1906, is officially reported in 117 Tennessee, pp. 618 to 679, inclusive, to which reference is hereby made.

After the rendition of said opinion directing a reversal against said Standard Oil Company of Kentucky upon the grounds above stated, the State of Tennessee upon relation of her then Attorney General, filed a bill in the Chancery Court of Sumner County against said Standard Oil Company of Kentucky, charging, in substance, that it had been guilty of conspiracies and agreements violative of the Tennessee anti-trust law, and praying that its permit or license to do business in the State of Tennessee be cancelled, and that it be ousted from doing business in the State of Tennessee, and enjoined from further carrying on its intra-state business in said State. Defense was made by said Oil Company to said bill and in due course of time the case came on for trial, whereupon the Chancellor, presiding in said Chancery Court, granted the relief prayed for and perpetually enjoined said Standard Oil Company of Kentucky from doing business in the State of Tennessee.

Thereupon said Standard Oil Company of Kentucky prayed and was granted an appeal from the decree of the Chancellor to the Supreme Court of Tennessee, and in due course, and according to the practice of said court, the case came on for hearing before the Supreme Court of Tennessee, whereupon by decree ordered about March 6th, 1908, but entered on April 11th, 1908, the decree of the Chancellor was affirmed by the Supreme Court of Tenessee, and it was, among other things, ordered and decreed as follows:

> "Therefore it appearing to the Court that the allegations of the original bill are sustained by the proof and that the defendants Standard Oil Company and its agents, Comer, Holt and Rutherford, and S. W. Lowe, W. H. Love, J. C. Crow and L. C. Hunter, as alleged in said bill, unlawfully entered into an arrangement and agreement for the purpose and with the view of lessening full and free competition in the sale of defendants' oil at Gallatin, and tending to and resulting in advancing the price of said oil to defendants' customers at

Gallatin; and it further appearing that the defendant, Standard Oil Company, in entering into said unlawful agreements violated the provisions of Section 1, of Chapter 140 of the Acts of 1903, and subjected itself to the penalty prescribed by Section 2 of said Act, applying to foreign corporations, it is accordingly so ordered, adjudged and decreed.

And thereupon the Court doth further order, adjudge and decree that the defendant, Standard Oil Company, a foreign corporation, chartered and organized under the laws of the State of Kentucky, be and is hereby denied the right to do, and prohibited from doing business within this State, and its license or permit to do business within this State, issued on the 21st day of September, 1893, by the Secretary of State, be and hereby is cancelled and annulled, and said defendant, Standard Oil Company, its managers, agents, servants and attorneys, are hereby perpetually enjoined and restrained from doing or carrying on business within this State; but nothing herein shall be construed to in any way affect or apply to defendant's inter-state commerce, or to prohibit it from engaging in inter-state commerce within this State."

A duly certified copy of the entire decree of the Supreme Court of Tennessee is herewith filed as Exhibit No. 1 to this answer, and is made a part of the same.

The opinion of said Supreme Court of Tennessee, directing and authorizing said decree, Exhibit No. 1 hereto, is officially reported in 120 Tennessee, pp. 86 to 179 inclusive, to which reference is hereby made.

Thereupon the Standard Oil Company sought and secured a writ of error from the Supreme Court of the United States to the Supreme Court of Tennessee for the purpose of reviewing the decree of said Supreme Court of Tenenssee, and in due course, upon the transcript of the record from the Supreme Court of Tennessee, the case came on for hearing in the Supreme Court of the United States upon the record at large, including assignments of error filed by said Standard Oil Company, on or about April 20th, 1910, and on May 2nd, 1910, the Supreme Court of the United States affirmed the decree of the Supreme Court of Tennessee and the Chancellor of Sumner County. The opinion of the Supreme Court of the United States, officially reported, is found in 217 U. S., pp. 817 et seq., and in due course the mandate of the Supreme Court of the United States was sent down to the Supreme Court of Tennessee directing an affirmance of its decree, hereinbefore referred to, and a certified copy of said mandate and the decree of the

Supreme Court of Tennessee thereon, directing the execution of its former decree, is herewith filed as Exhibit No. 2 to this answer, and made a part of the same.

At that time, that is, during the ouster proceedings by the State of Tennessee against the Standard Oil Company of Kentucky, all of the stock of said Oil Company was owned by the Standard Oil Company of New Jersey, and said Standard Oil Company of Kentucky was owned, dominated and controlled by said Standard Oil Company of New Jersey.

After the decision and decree of the Supreme Court of Tennessee, hereinbefore referred to, (Exhibit No. 1) restraining the said Standard Oil Company of Kentucky from doing business in Tennessee, its owner, the Standard Oil Company of New Jersey, organized, or caused to be organized, the Standard Oil Company of Louisiana.

At the time of the organization of said Standard Oil Company of Louisiana, on or about the 16th day of June, 1909, the said Standard Oil Company of Kentucky had secured a writ of error from the Supreme Court of the United States to the Supreme Court of Tennessee, as hereinbefore shown, and the cause was then pending in the Supreme Court of the United States. Prior to the affirmance of the decree of the Supreme Court of Tennessee, as aforesaid, the Standard Oil Company of Louisiana had not attempted or sought to do any business in the State of Tennessee, or applied for permission or license to do business in this State, but on May 6th, 1910, only four days after the Supreme Court of the United States had affirmed the ouster decree against the Standard Oil Company of Kentucky, as hereinbefore shown, the said Standard Oil Company of Louisiana filed a copy of its charter with the Secretary of State of Tennessee, and went through the form of complying with the requirements of the foreign corporation laws of Tennessee with reference to such corporations doing business in said State. The facts are, that both of said corporations, to-wit, the Standard Oil Company of Kentucky and the Standard Oil Company of Louisiana, were but dummies, though clothed with corporate form, and were absolutely owned, dominated and controlled by the Standard Oil Company of New Jersey, which prior to the injunction referred to was doing business in the State of Tennessee under the name and guise of the Standard Oil Company of Kentucky, its creature and dummy, and after the Supreme Court of the State of Tennessee was affirmed by the Supreme Court of the United States, the said Standard Oil Company of New Jersey continued to do business in the State of Tennessee through its dummy, the Standard Oil Company of Louisiana, by a

simple subterfuge of filing with the Secretary of State a copy of the charter of the said Standard Oil Company of Louisiana, and changing the name in Tennessee from the Standard Oil Company of Kentucky to the Standard Oil Company of Louisiana.

There was no change whatever in the management of the business. Not only was it dominated and controlled by the same owner, but it retained the same management in the State of Tennessee, the same officials, the same employees, and using the same property and paraphernalia of trade—the only difference being that upon the tank wagons, stations and stationery the name "Kentucky" was stricken out and the name "Louisiana" was substituted, so that the corporate or business name appeared to the public and the Standard Oil Company of Lousiana instead of the Standard Oil Company of Kentucky. The officials of the State of Tennessee did not know at the time the copy of the charter of the Standard Oil Company of Louisiana was filed in the office of the Secretary of State of Tennessee that it was but a dummy owned and controlled by the Standard Oil Company of New Jersey, which was also the owner of the offending Standard Oil Company of Kentucky, which had been ousted from the State; and said officials of the State of Tennessee did not know that the said "managers, agents, servants and attorneys" of the Standard Oil Company of Kentucky, who had been enjoined from doing business in the State of Tennessee, as shown by said decree, Exhibit No. 1 hereto, were continuing to do and carry on the same business under the fraudulent name and guise of the Standard Oil Company of Louisiana. The facts with reference to this fraud and subterfuge were developed recently.

Therefore, defendants say and aver that the Standard Oil Company of Louisiana being but a dummy of the Standard Oil Company of New Jersey, and the reflection of its dummy the Standard Oil Company of Kentucky, was fradulently substituted by the common owner, the Standard Oil Company of New Jersey, into the oil business of Tennessee from which said Standard Oil Company of Kentucky had been ousted, and the said Standard Oil Company of Louisiana has never legally and properly complied with the laws of the State of Tennessee, and it has never had, and it has not now the right to do business in the State of Tennessee. Defendants charge that said Standard Oil Company of Louisiana came fraudently into the State of Tennessee, in the manner aforesaid, and is now in contempt of the decree and injunction of the Supreme Court of Tennessee and of the Chancery Court of Sumner County.

Defendants deny that the Standard Oil Company of

Louisiana has been legally qualified to do business in the State of Tennessee, or that it has any standing in this court, and avers that coming into this court with unclean hands it has no standing in this court of equity to challenge the legislation of the State of Tennesee affecting its claimed domestic trade and commerce, and is not in a position to question in this Court of Equity the validity of the Act described in the bill in this cause.

Defendants are informed, believe and therefore charge the fact to be that the Standard Oil Company of Louisiana, as the representative and dummy of the Standard Oil Company of New Jersey, has continued the system of rebates and preferences to retail dealers, and other illegal methods hereinafter to be specifically indicated, from the date of the alleged chartering of the Standard Oil Company of Louisiana, and its alleged domestication in the State of Tennessee, up to the filing of this suit, and is continuing such practices for absolutely controlling the prices at which gasoline and other petroleum products are sold in Tennessee, at extortionate prices, and have a fixed determination to continue such control and management of the sales of such products at its will to the public of Tennessee. The Standard Oil Company of New Jersey simply uses to carry out this policy the Standard Oil Company of Louisiana, owned and controlled by it, as one of its allies in carrying out such control, to the great damage and detriment of the users of such products.

From the foregoing recitations and allegations of fact as to the policy of the said Standard Oil Company of New Jersey to control absolutely at its will the selling price of gasoline, and other petroleum products, in the State of Tennessee, through its subsidiaries or foreign corporations operating in Tennessee, that Company and the Standard Oil Company of Louisiana, by it owned and absolutely controlled, both said companies have continuously been and are now in contempt of the decree of the Chancery Court and the Supreme Court of Tennessee, affirmed, as aforesaid, by the Supreme Court of the United States, in attempting to do business in this State since the issuance of the injunction hereinbefore referred to and set out.

Defendants further say, and so aver and charge, that by reason of its connection with and its participation in the said policy of the said Standard Oil Company of New Jersey, and said Standard Oil Company of Louisiana, the plaintiff, Texas Company, is itself likewise in contempt of the said decree of injunction, in attempting to do business in this State in the marketing and selling of gasoline.

II.

The defendants are advised that it is both proper and necessary to give a brief history of the development of the petroleum industry in this country, for the purpose of showing the causes that made it expedient for the enactment of the Act, challenged in plaintiff's bill, for the benefit of the people of Tennessee, which are directly connected with and a part of the unjust and unfair conditions that existed for many years prior to the passage of said Act, in practically all the States of the United States, whereby the public in the different states has been compelled to pay unreasonable extortionate prices for gasoline.

The history of the petroleum industry in this country is practically the history of the Standard Oil Company:

The first Standard Oil Company was organized in 1870, in the State of Ohio, by John D. Rockefeller, William Rockefeller, Samuel Andrews, Henry M. Flagler and Stephen D. Harkness. Between the date of the organization of this company and April 1879, the men named, in connection with Henry H. Rogers, John D. Archibald, O. H. Payne and C. M. Pratt, had acquired control of more than forty competitive refineries, and were in control of more than thirty companies engaged in the oil business. On April 8th, 1879, the stock of the Standard Oil Company, as well as that of other companies, was conveyed to three trustees. On the 2nd day of January 1882, a new trust agreement was entered into by the parties mentioned, together with other associates, with reference to the management of the companies over which they had acquired control, and for the purpose of extending this business.

The agreement provided that all the stock of these companies was to be placed in the hands of nine trustees, which included the said Rockefeller, Flagler, Rogers and Archibald. The fourth provisions of this trust agreement is as follows:

> "(4) Each of said corporations shall be known as the Standard Oil Company of ———————— (and here shall follow the name of the state or territory by virtue of the laws of which said corporation is organized.)

This combination was declared to be illegal by the Supreme Court of Ohio in the case of State ex rel Watson vs. Standard Oil Company, 15 L.R.A. 145, decided by the Supreme Court of Ohio on March 2nd, 1892, and the Standard Oil Company of Ohio was forbidden to do business in that State.

Before this litigation, however, the trustees named had

organized the Standard Oil Company of New York, and had acquired control of several other subsidiary companies. To meet the situation obviously resulting from the adverse decision of the Supreme Court of Ohio, the charter of the Standard Oil Company of New Jersey was emended and its stock increased from $10,000,000.00 to $110,000,000.00. The stock in the various companies that had been acquired by the trustees was transferred to the Standard Oil Company of New Jersey and its stock certificates issued in lieu thereof, and thereafter the affairs of the combination were managed by the Board of Directors of the Standard Oil Company of New Jersey, who were the same men who had operated under the trust agreement.

A bill was filed in the United States District Court for the Eastern District of Missouri against the Standard Oil Company of New Jersey and seventy other subsidiaries, including the Standard Oil Company of Kentucky, the Standard Oil Company of California, the Standard Oil Company of Indiana, the Standard Oil Company of Nebraska, the Standard Oil Company of New York, the Standard Oil Company of Ohio, and the Waters-Pierce Oil Company. The bill alleged the facts hereinbefore recited, and charged that these companies were being operated in violation of the Sherman Anti-Trust Act. The bill was sustained and the combination held to be illegal, in the District Court, in November 1909, (173 Fed. 177). This decree was affirmed by the Supreme Court of the United States in May 1911, (211 U.S. 1 Book 55, p. 619).

The facts upon which the Supreme Court of the United States granted relief and predicated its decree are, in substance, as follows:

That both said Standard Oil Trust from 1882 to 1899, and the Standard Oil Company of New Jersey since 1899, had monopolized and restrained commerce in petroleum and its products. The particular practices, unlawful agreements and combinations with alleged independent concerns, are set forth and referred to in the opinion of the Court; and without attempting to elaborate, or set forth in detail, all of the unlawful practices indulged in by said Standard Oil Companies, the following outstanding facts are referred to, to-wit: Rebates, preferences and other discrimnatory practices in favor of combinations with the railroad companies; restraint and monopolization by contract with pipe lines, and unfair practices against pipe lines; contracts with competitors in restraint of trade, unfair methods of competition, such as local price cutting at points where necessary to suppress competition; espionage of the business of competitors, the incorporation and operation of bogus independent

companies, and payment of rebates on oil with intent to stifle and prevent competition; the *division of the United States into Districts*, and the limiting of the operation of subsidiary corporations as to such districts so that competition in the sale of petroleum products between such corporations were entirely eliminated and destroyed.

The defendants charge that practically all of the said unfair practices and methods for controlling absolutely the selling price of gasoline, (and as for that matter other petroleum products not referred to in the Act here challenged) existed in Tennessee and all other States, and are and have been practiced by the different corporations, agents, etc., owned and controlled by the Standard Oil Compaines, grouped as hereinafter stated, and such methods of controlling the prices have all the time been and are still being used to exact unreasonable and extortionate prices from the public using and having to purchase gasoline.

Defendants state that the practices in favor of combination with railroad companies, above mentioned, have perhaps been abandoned because of the laws of the United States and the different States passed on that subject, but the other methods of controlling absolutely the price, and thereby securing the power to dominate the oil industry, and sale of gasoline and other oil products, have been resorted to and are pursued by the Standard Oil Companies; and the plaintiff, The Texas Company, in Tennessee prior and up to the enactment of the Act herein questioned, linked with, and acting in concert with the said Standard Oil Companies is exercising the power to charge and exact, and in fact exacting by the said Standard Oil Companies and the plaintiff unreasonable and extortionate prices for gasoline sold in Tennessee; and such extortionate and unreasonable prices are now being exacted and paid by the public in Tennessee, and the plaintiff is insisting upon the right to do so in challeging the validity of this Act.

The Court held that the organization and management of the Standard Oil Company of New Jersey, and its subsidiaries and associates was illegal, and that such unfair and illegal practices for controlling the price of oil products had been pursued and used by the Standard Oil Company of New Jersey, and other defendant companies allied with it, and owned and controlled by it, in the manner stated in the opinion. The reasons and the facts for the decree made in said cause, dissolving the combination or trust as in violation of the Anti-Trust Act of July 2nd, 1890, known as the Sherman Law, are set out in the opinion in the said cause of the Standard Oil Company vs. United States,

221 U.S., on pages 75-77 of the opinion, in the following paragraphs:

"(a) Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock, and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the prima facie presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole *with the purpose of excluding others from the trade*, and thus centralizing in combination a perpetual control of the movements of petroleum and its products, in the channel of inter-state commerce.

(b) Because the prima facie presumption of intent to restrain trade, to monopolize, and to bring about monopolization, resulting from the act of expanding the stock of the New Jersey corporation and vesting it with such vast control of oil industry, is made conclusive by considering (1) the conduct of the persons or corporations who were mainly instrumental in bringing about the extension of power in the New Jersey corporation before the consummation of that result, and prior to the formation of the trust agreements of 1879, and 1882; (2) by considering the proof as to what was done under those agreements and the acts which immediately preceded the vesting of power in the New Jersey corporation, as well as by weighing the modes in which the power vested in that corporation has been exercised, and the results, which have arisen from it.

Recurring to the act done by the individuals or corporations who were mainly instrumental in bringing about the expansion of the New Jersey corporation during the period prior to the formation of the trust agreements of 1879 and 1882, including those agreements not for the purpose of weighing the substantial merits of the numerous charges of wrong doing made during that period, but solely as an aid for discovering intent and purpose, we think no disinterested mind can survey the period in question without being irresistibly driven to the conclusion *that the very genius for commercial development and organization which it would*

seem was manifested from the beginning soon begot an intent and purpose to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which, on the contrary, necessarily involves the intent to drive others from the field and to exclude them from their rights to trade, and thus accomplish the mastery which was the end in view, and considering the period from the date of the trust agreements of 1879 and 1882, up to the time of the expansion of the New Jersey corporation, the gradual extension of the power over the commerce in oils, which ensued, the decision of the Supreme Court of Ohio, the tardiness or reluctance in conforming to the commands of that decision, the methods first adopted, and that which finally culminated in the plan of the New Jersey corporation, all additionally serve to make manifest *the continued existence of the intent which we have previously indicated, and which, among other things,* impelled the expansion of the New Jersey corporation. The exercise of the power which resulted from that organization fortifies the foregoing conclusions, since the development, which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, *the slow but resistless methods which followed by which means of transportation were absorbed and brought under control, the system of marketing which was adopted by the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention.*" (Italics are ours.)

"The inference that no attempt to monopolize could have been intended and that no monopolization resulted from the acts complained of, since it is established that a very small percentage of the crude oil produced was controlled by the combination, is unwarranted. As substantial power over the crude products was the inevitable result of the absolute control which existed over the refined product. The monopolization of the one carried with it the power to control the other; and if the inferences which this situation suggests were developed, which we deem it unnecessary to do, they might well serve to add

additional cogency to the presumption of intent to monopolize which we have found arises from the unquestionable proof on other subjects."

Defendants state that aside from a colorable distribution of the stock held by the Parent Company, the order of the Supreme Court of the United States has never been complied with, and the evils condemned in the opinion of the Court in that cause, have never been remedied nor abandoned. The practices of the various Standard Oil Companies have been complained of and condemned by the courts in many States, and finally in 1923, the complaints, with reference to the conduct of the large petroleum corporations particularly the Standard Oil group of companies, became so general and wide-spread, that a committee was appointed by the United States Senate to investigate and report with reference thereto. An investigation, lasting several months, was conducted by said committee; the presidents of the various Standard Oil Companies, and other large petroleum corporations appeared and testified before said committee, and after a full investigation, the committee submitted to the Senate a unanimous report to which reference is here made. And, among other things, this report recites:

"The dominating fact in the oil industry today, is its complete control by the Standard Companies. Any discussion of the subject which does not frankly recognize this control can only be misleading. Standard Oil today fixes the price which the producer of crude oil receives at the well, the price which the refiner receives for his gasoline and kerosene, as well as the retail price paid by the consumer. The Standard Oil Group divides among the members of that group all the territory of the United States, and, with slight exceptions to be presently noticed, avoids all competition with other members of the group in the business of retailing gasoline and kerosene. Not only this, but two of the leading Standard Companies—New Jersey and New York—divide the world between themselves in retail marketing operations, and each carefully abstains from entering the territory of the other, while both refrain from competing with the Anglo-American Oil Company (Ltd) (One of the original Standard Group) in the retail trade in the British Isles."

"Through the Standard control of the pipe lines connecting the producing centers of the West with the consuming centers of the East and Middle West, not only is the price fixed according to the will of the Standard Group which any other interest must pay for

the transportation of petroleum, but members of the group really determine whether any concern outside their group shall have petroleum transported at any price."

"The methods by which the Standard Companies control the oil industry today, are more subtle than those by which the Standard Oil Company of New Jersey, through its subsidiaries controlled it prior to the dissolution decree in 1911. But the results are the same."

And again:

"A careful examination of the evidence taken in this investigation will show that in respect to the above matters and others which lead to the outlawing of the Standard Oil monopoly, the same conditions exist as existed when the decree of the Supreme Court was entered, and that in some respects the industry as a whole, as well as the public, are more completely at the mercy of the Standard Oil interests now than they were when the decree of dissolution was entered in 1911. This point cannot be too strongly emphasized, for the reason that the intolerable conditions in the oil industry which are established in this investigation cannot be corrected while the Standard Oil dominates the business as it does today."

And again:

"The controlling factor in fixing the retail price of gasoline and other petroleum products is the dominance by the Standard Oil Companies of the retail market for these products throughout the United States, and particularly of gasoline and kerosene. Just as the Standard Companies fix the price which the producer must accept at the well for his crude oil, as do they fix the price which the consuming public has to pay at retail for gasoline, and to a large extent for kerosene. The great Standard Oil marketing companies, by confining their operations to a single fixed territory, are able to easily control the retail price of gasoline and kerosene in their respective territories."

And again:

"The companies of the Standard group co-operate with each other where such co-operation seems desirable or necessary in order to meet the competition of independents."

And again:

"It must be obvious from the facts set forth in this report that the business cannot go on as at present organized and conducted. It is essential to the life of

the industry and vital to the public also that neither the public nor the small independent producers and refiners shall be left as at present to the mercy of a combination which advances or depresses prices as it pleases. Unless some means can be found to prevent the manipulation of prices by the large companies, and particularly the Standard group, it is as certain as any future event can be that gasoline prices in the near future will be so advanced as to put gasoline beyond the reach of the public generally as a motor fuel. Great as the capital invested in the business has become, important as the business is to thousands who are engaged in it and to other thousands who receive dividends from it, there is a still more important interest to be reckoned with, and that is the interest of the public. Petroleum and its products have become an absolute necessity. The business is clothed with a great public interest. The gas plants, electric light plants, railroads and street cars are no greater universal necessities than petroleum and its products."

The committee recommended Government control of the industry in various ways set out in the report, and also, recommended criminal prosecution of the officers of the companies, and that action be taken by the Department of Justice for the annullment of the so-called patents and leases herein complained of, and that the pipe lines operated by these companies in the aid of their combination be made common carriers and be under the control of the Government.

This report was made on the —— day of ————— 1923, and notice is here given that a full copy of said report, if procurable, will be offered upon the hearing of this cause.

Following, and it may be as a result of the aforesaid and other investigations and disclosures, the Honorable Harlan F. Stone, formerly Attorney General of the United States, filed on the 25th day of June 1924, a bill in equity on behalf of the United States, in one of the District Courts of the United States at Chicago, against the Standard Oil Company of Indiana, the Standard Oil Company of New Jersey, the Standard Oil Company of Kentucky, the Standard Oil Company of California, the Standard Oil Company of Kansas, the Standard Oil Company of Ohio, the Standard Oil Company of Louisiana, the Texas Company, plaintiff herein, and numerous and subsidiary companies. Later a supplemental bill was filed in said cause by the present Attorney General of the United States. In said suit it was charged by the United States that said defendants, including plaintiff herein, were in an unlawful combination to

dominate and control the manufacture and marketing of gasoline in violation of the laws of the United States.

The facts upon which the United States sought relief against said defendants in the aforesaid suit are set out in the aforesaid original and supplemental bills, and these defendants deem it proper and do now show and aver that said facts are as stated in said original and amended and supplemental bills, and in order that this Court may understand some of the salient facts upon which the United States predicated its aforesaid suit in equity, an excerpt from said pleading is here set out as follows:

"Defendants are of two classes:

(a) Standard Oil Company (of Indiana), Standard development Company (to the extent that its parent company, Standard Oil Company of New Jersey has conveyed to it patents and alleged patent rights relating to cracking processes), Texas Company (plaintiff herein) and Gasoline Products Company, hereinafter referred to as 'primary defendants'.

(b) All other defendants hereinafter referred to as 'secondary defendants.'

Each primary defendant owns numerous United States and foreign patents, and applications for patents of the character hereinbefore described. The term 'primary defendant' is used to designate these parties (a) because of the broad scope and importance of their asserted patent rights, (b) because all of said alleged patent rights are, by a system of cross arrangements hereinafter described, handled substantially as a unit or pool by said defendants in dealing with licensees, assignees, and grantees, under any of said patent rights, and (c) because these defendants are primarily responsible for the institution and continuation of the unlawful conditions and practices against which this suit is aimed.

Each secondary defendant is a party to an agreement or agreements with one or more of the primary defendants, by which agreement or agreements such secondary defendant has been given certain alleged patent rights, privileges, or immunities, as assignee, grantee or licensee. The term 'secondary defendant' is applied to these defendants for the reason, that although by entering into the agreements containing the restraints of inter-state and foreign trade hereinafter set forth, they have become parties to unlawful combination, conspiracy and monopoly herein complained of, the secondary defendants are subscribers to rather than the promoters of the same, they being unable to secure

manufacturing privileges under any of the alleged patent rights controlled by the primary defendants without agreeing to such trade restrictions and other terms as the primary defendants without agreeing to such trade restrictions and other terms as the primary defendants see fit to impose, and they being unwilling to incur the hostility of the primary defendants by employing the cracking process without their consent.

The primary defendants, seeking to restrain and monopolize the inter-state and foreign trade and commerce of the United States in gasoline and kerosene, and other products of petroleum, and to realize huge profits by extorting from all concerns engaged in the manufacture of cracked gasoline large sums in the guise of royalties, and to impose on all concerns so engaged onerous and oppressive conditions designed to insure to said defendants a monopolistic control of such trade and commerce, have made and entered into, one with another, a series of agreements, (herein called primary agreements) whereby alleged rights were conveyed to each other under their respective patents and asserted rights were effectively pooled. By granting rights under prospective as well as existing patents, provision was made for extending the combination and monopoly beyond the life of any patent now owned by the defendants. Each thus protected its patents and asserted rights against attack by the others, and they were enabled to present a solid front to all manufacturers of gasoline who were compelled by competition to avail themselves of the economies resulting from the use of the cracking process.

Said agreements provided for the payment of heavy royalties ranging from a half of a cent to a cent and a quarter per gallon on gasoline produced by the cracking process for domestic consumption.

These charges, included by defendants as a part of their cost of manufacture, have had the effect to burden and restrain interstate and foreign commerce in the above mentioned commodities by increasing the price thereof. In addition, numerous, onerous and oppressive covenants and conditions are included in said agreements which directly impede and restrain such trade and commerce by restricting the production of such commodities and by securing to certain of said defendants, more especially the Standard Oil Company of Indiana, a virtual monopoly of the trade and commerce therein in particular territories. Said primary agreements not only purport to convey manufacturing rights

but also authorize the respective licencees to grant sublicenses thereunder containing like onerous restrictions and provisions.

Numerous other manufacturers of gasoline and petroleum products, finding it necessary to employ the cracking process in order to compete with their rivals, and fearing to incur the hostility of the primary defendants so banded together by employing such process without their license, have accepted from such primary defendants licenses under the patents and asserted rights which have been pooled as aforesaid, in and by which they have agreed to pay to such primary defendants huge royalties as aforesaid, and have submitted to the numerous onerous and oppressive covenants and conditions hereinabove mentioned. Each manufacturer receiving such a license has become a party to the unlawful combination and monopoly, has estopped itself from hereafter questioning the validity of the patents under which it is licensed, and in a majority of instances, such licensees have reciprocally agreed to license the primary defendants under any patents relating to the cracking art which they have or may obtain in the future."

The distinctive features of said licenses are:

(a) A combination among the different Standard companies setting out the territory in which each may manufacture and sell gasoline.

(b) The dominion and control of all so-called independent refineries, in that these so-called independent refineries are restricted in the amount of gasoline they are allowed to manufacture. They are restricted in the territory in which they are allowed to operate and sell, and they are required to pay huge royalties to the Standard Companies for the privilege of manufacturing gasoline.

(c) The result is that the Standard companies dominate and control the production and manufacture of gasoline, and there is really no such thing as an independent refinery.

Said litigation between the United States and said Oil Companies is still pending. A great deal of proof has been taken and defendants are informed that the cause is soon to be tried.

In the said suit filed by the United States through its Attorney General, Harlan F. Stone, on the 25th day of June, 1924, charging the plaintiff herein, The Texas Company, and other Standard Oil Companies, hereinbefore mentioned, with being in an unlawful combination to dominate and control the manufacture and marketing of gasoline in violation of the laws of the United States, the plaintiff

herein is made one of the "primary defendants," the other primary defendant being the Standard Oil Company of Indiana, and the Standard Development Company (to the extent that its parent company, the Standard Oil Company of New Jersey, has conveyed to it patents and alleged patent rights relating to cracking processes.) The other defendants in that suit, to-wit, the Standard Oil Company of New Jersey, the Standard Oil Company of Kentucky, the Standard Oil Company of California, the Standard Oil Company of Kansas, the Standard Oil Company of Ohio, and the Standard Oil Company of Louisiana, were named as "secondary defendants." Each primary defendant is alleged to own numerous United States and foreign patents, and application for patents of the character designated and described in a previous part of the bill—that is, patents claimed by the Standard Oil Companies made defendants in the bill, (the primary as well as the secondary defendants) securing the right to control the manufacture of gasoline. The government is alleged to charge these patents as being fraudulently obtained.

It is charged that all of the Standard Oil Companies made defendants, soon after the dissolution of the Standard Oil Trust under the decree of the Supreme Court in 1911, entered into a scheme for dominating and controlling the entire production of gasoline by means of contracts among themselves and with refiners, which contracts are called licenses. Defendants therefore charge upon information and belief that the facts set forth in the said Senate report, as a result of a full and complete investigation of the oil industry and trade, including gasoline, in the United States, including the State of Tennessee, and the facts set forth in the said bill filed by the Attorney General of the United States on the 25th day of June, 1924, and the amendment thereto, show that the plaintiff is now and has been for many years a party to the undertakings and agreements entered into, and has in every sense carried them out for the absolute control of the sales prices of gasoline and other oil products in the State of Tennessee, and that it is co-operating with the Standard Oil Companies hereinbefore mentioned, and has been for a period of many years, in exacting unreasonable and extortionate prices for gasoline sold to the public in the State of Tennessee, by the unfair and illegal methods hereinbefore stated and charged against the said Standard Oil Companies in the marketing and sale of gasoline in said State of Tennessee. The Standard Oil Company of New Jersey, in truth and in fact, since the dissolution of the Standard Oil Trust by the Supreme Court of the United States, has dominated and controlled the entire

industry of the United States and the prices at which all petroleum products, including gasoline, have been sold from time to time, and still does by a division of the territory of the United States hereinbefore set out as a fact and declared to be a fact by the Supreme Court of the United States.

To show how completely this control and domination is and still prevails in Tennessee, and that it is a fixed policy of the Standard Oil Companies to continue to control and maintain the power to control the sale of gasoline in Tennessee, defendants in addition to the illustrations hereinbefore made, state that among the territories in which the Standard Oil Company of Louisiana operates in the sale of gasoline and other oil products, in the State of Tennessee, and that whenever any competition appears from independents operating in any parts of the State, the said Standard Oil Company of Louisiana lowers the price of gasoline by picking certain retail dealers, or by selling at its own stations at lower prices, sufficient in the end to drive out such competition as they desire to be driven out, and have all the time pursued that course and still pursue it. However, the said Standard Oil Company of Louisiana never loses anything by such special instances of variance from its extortionate and excessive prices, from the fact that elsewhere in the State or in other States, it raises the prices for the time being sufficient to offset the loss. As an instance, during the years 1923, 1924 and 1925, the Standard Oil Company of Louisiana and its subsidiary companies operating in this State, in their effort to destroy competition in Tennessee, lowered the price of gasoline below the cost of importation and all other costs, to the consuming public, but at the same time raised the price from five to twelve cents a gallon in neighboring States. The price of gasoline to the consuming public was around fifteen cents a gallon when this effort was being made to drive out competition at that point, but at Hopkinsville, Kentucky, twenty-six miles north of Clarksville, the consuming public was charged by a subsidiary Standard Oil Company operating in that State, twenty-eight cents a gallon—making the consuming public at Hopkinsville, and adjacent territory in that State, pay for the losses in Clarksville, at the same time the Standard Oil Company of Louisiana would not cross the Kentucky line and sell at the Tennessee price, or any other price. The gasoline handled by the Standard Oil Company of Louisiana, and that handled by the Standard Oil Company of Kentucky, which was supplying Hopkinsville, during this period was shipped from the same refinery at Baton Rouge,

Louisiana, and the freight rates and costs were the same from that point to Hopkinsville and Clarksville.

III.

The extortionate and unreasonable prices being charged at the time, and for many years prior thereto, and sustained by the unlawful practices hereinbefore set out, having for their purposes and in fact succeeded in preventing competition to any worth-while extent, and then only for brief periods of time in localities here and there throughout the State, had become so unbearable that the Governor in response to the public opinion of the State, in his message to the present General Assembly, recommended legislation to control the distribution and prices of gasoline. He recited that the people of the State had been victimized long enough in the excessive cost of gasoline; that the State regulated the cost of gas and electricity, a matter of far less importance than the regulation of the cost and distribution of gasoline. The message stated that this commodity to all effects and purposes is now controlled by a monopoly; that there are numerous refiners and many distributors of gasoline in the State, but that a single company in reality made the market on gasoline; that sometimes there was competition in prices, but that was occasionally, and for the purpose of preventing and destroying competition, and such periods were always succeeded by higher prices. The Governor recommended a proper agency to be created to regulate prices of gasoline—its cost, distribution, etc., for the protection of all distributors of gasoline against the machinations and unfair practices of more powerful competitors, and that the public might be charged a fair and reasonable price for gasoline; the message declared that the people had submitted to extortion long enough, and that the people were being plundered without let or hindrance in the prices they had to pay for it, and were powerless under existing laws to compel relief. The result of this message and the suffering of the people of Tennessee from the rapacity of the monopoly of the one company referred to, and companies allied with it, was the passage of this Act here challenged in plaintiff's bill.

IV.

The length of time plaintiff has been engaged in selling gasoline in this State, the number of points at which it now is and has been selling it, how it conducts its business through agents and employes, and the extent of the business it has built up, and the details thereof, and what it expects to do in enlarging its business, all set out in para-

graph II of the bill, may be true or not, and is a matter of no concern in the determination of the issue presented in this cause.

V.

The Act in question is referred to in paragraph III of the bill, and plaintiff's view of the legal nature of its contents, and the constitutional objections made thereto, are all matters for the Court, and need no specific reply by referring to each of the contentions and paragraphs therein, and specifically pointing out the error of the contentions made. It is sufficient to say that none of the objections made to the validity of this Act by reason of certain provisions of the Constitution of the State of Tennessee and the Constitution of the United States are well taken in the judgment of the defendants, and the same are denied as having any merit.

VI.

Coming to paragraph IV of the bill, defendants deny that the Act is in conflict with either the Constitution of this State or of the United States for any reason mentioned therein. The Act does not violate any part of Section 20 of Article 1 of the Constitution of this State in being a retrospective law in the sense of that provision, and does not impair the obligation of any contract that may have been made prior to the passage of same. If any such contracts have been made they in no way affect the governmental police power exercised by the passage of this Act. It is not within the power of any domestic or foreign corporation to tie up by contracts the exercise of the police power in providing for the regulation of any trade or business impressed with a public interest. It does not violate Section 8 of Article 1 of the State Constitution in any respect insisted upon in said paragraph IV of the bill, nor does it violate Section 8 of Article, nor does it violate Section 8 of Article XI of the Constitution; nor does it violate Sections 1 and 2 of Article of the State Constitution in the procedure provided for ascertaining the charge to the public for gasoline—the maximum price for which it may be sold to the public. The provision that on appeal from the action of the Superintendent, approved by the Commissioner, such action may be reviewed in the Chancery or Circuit Court of Davidson County, and that the Court may in its discretion either supersede or modify such order fixing the maximum price in such manner and upon such terms and conditions as may appear to be proper, is in no way objectionable, and does not vest in the Court or the

Judicial Department of the State the right to exercise the legislative power of making the rates.

VII.

The Act does not conflict with the Due Process clause of the Fourteenth Amendment of the Constitution of the United States, nor the Equal Protection of the Law clause thereof. It does not violate either of these clauses of said Constitution by taking property without due process of law, or the equal protection clause of the law, in that it does not apply to the business of other persons and corporations engaged in selling other commodities in the State. It is not true that the business of marketing and selling gasoline in Tennessee is not impressed with any public interest such as would justify legislative control as to prices. The statement in said paragraph that there is no justification for a law which limits and restricts plaintiff and others engaged in the sale of gasoline in the State of Tennessee in such a way as to protect the middleman, regardless of the interest of this plaintiff and others engaged in the sale of gasoline, on the one side, and the public on the other side, is a mere assertion and is erroneous in law and in fact as to the purpose and effect of the Act here challenged.

The Act does not violate Section 10 of Article 10 of the Constitution of the United States denying Congress the power to pass laws impairing the obligation of contracts, nor does it violate the commerce clause vesting in Congress the exclusive right to regulate commerce among the several States.

VIII.

The several contentions in paragraph VI of plaintiff's bill, assigned for this Court taking jurisdiction by injunction to prevent the execution of this Act, are unsound, and afford no ground for the jurisdiction invoked. First, it is not true that there will be a complete cessation of the sale of gasoline in the State of Tennessee for a long period of time; second, the defendant is a foreign corporation and cannot do business in this State unless it complies with the statutes of the State permitting it to domesticate for doing business in the State. The State can fix its own conditions for permitting such corporation to do business in the State, and if such conditions are not satisfactory to the foreign corporation—which cannot be admitted in the first instance, and if the conditions are added to or become heavy while it is in the State under its admission, it has the simple remedy to retire from the State, and when admitted it accepts the admission with the knowledge that under the law

the State can change the condition upon which it may continue to do business. The conditions under which this Act is to apply to foreign corporations are the same that apply to domestic corporations in the same business, therefore, there is no denial of equal protection of the law of the State to such foreign corporation.

IX.

For the reasons stated in the motion, the plaintiff has no right to invoke the jurisdiction of the Court for injunctive remedy—nothing having been done to prejudice its constitutional rights, and nothing may ever be done having such effect, and nothing has been done or shown to this Court upon which an injunction could operate. Further, it cannot invoke the jurisdiction of this Court until it shall have submitted to the procedure for the protection of its constitutional rights, and exhausted every step provided in that procedure to assert such rights.

The procedure outlined for ascertaining what the maximum charge shall be for gasoline is strictly within the due process clause of the Fourteenth Amendment, and within the provisions of the Constitution of the State. Further, the plaintiff has a complete remedy provided by the law of the State to protect its property and its business, by the simple remedy of withdrawing from the State, and shows no distinct head of equity jurisprudence necessitating the action of this Court by injunction in its behalf.

The other objections made in said paragraph VI are certainly without merit, and nothing need be said in reply thereto.

The statute having declared that the sale and marketing of gasoline in this State is impressed with public use, the law presumes that the nature of that business, and its conditions were such as to warrant the enactment of this Act. This Court must take judicial cognizance of the nature of the business of marketing and selling gasoline and that the sale of it by the public has become such, and was at the time of the passage of the Act, that the property connected with and invested in said business has been by the owner thereof devoted to a use in which the public has an interest, and that the owner thereof has granted to the public an interest in such use, and must to the extent of that interest in the public submit to be controlled by the public, for the common good as long as the owner maintains the use. Granted or recognition of the public interest in the use may be withdrawn or revoked by the owner ceasing to continue the use of it for the public, or in the public interest.

The business of selling and marketing gasoline in Tennessee has for many years been devoted to the interest of the public, to the use of the public, and the property used in such business likewise was devoted because it is a mere instrument of the business itself. The business by its circumstances and nature has arisen from private to public concern, and is therefore subject to the governmental control exercised by the General Assembly of this State in the Act here challeneged. The liberty of contract guaranteed by the Constitution of Tennessee and the United States is no more involved in the method of price regulation authorized by this Act than in any other proper forms of regulation of business and property affected by a public use, and the business of the plaintiff, and the property employed in the carrying on of its business is therefore subject to the governmental power of this State exercised in said Act.

The plaintiff, and other dealers, in selling and marketing gasoline in this State is now, was at the time of the passage of said Act, and for many years prior thereto devoting its business and property connected therewith to the use of the public. The very nature of the business is such that the public has an interest therein as long as it is carried on, and the legislative power of the State can regulate it as the Legislature of Tennessee has done in this instance. The character of it tends to a common charge or price that must be paid by the public if the commerce, economic and social interests of the State are to be served.

X.

The defendants show and aver that the plaintiff herein, and other like companies engaged in the business of refining and marketing gasoline, and having a practical monopoly of the sale of gasoline in the State of Tennessee, and by their methods and practices hereinbefore set out, have a settled policy to control the sale of gasoline, and by such control, which they have in fact, as hereinbefore averred, have been and are exacting extortionate and unreasonable prices therefor, to prevent which the people themselves could not without the aid of legislation protect themselves. Plaintiff and like dealers have by their representations as to its wide-spread useful qualities, particularly for power and motor purposes, so induced the people of Tennessee to the use of gasoline, particularly for motor and power purposes, that said commodity, by said plaintiff and others allied with it, and dealing therein, has been and is devoted to the public use, and has become and is affected with a public interest, and is therefore subject to reason-

able regulations as to its use and price by the State of Tennessee.

Defendants aver that gasoline has become of such general use as to affect directly or indirectly practically all of the people of Tennessee, as is shown by the fact that the sales of gasoline in Tennessee in 1924 amounted to more than ninety million gallons, and such sales were increased in 1925 to more than one hundred and ten million gallons, and in 1926 to more than one hundred and twenty-nine million gallons. There are in use in the State of Tennessee more than 280,000 motor vehicles, consisting of automobiles, trucks, motorcycles, taxicabs and busses, to the operation of which gasoline is an absolute necessity; and in addition to such motor driven vehicles, there are thousands of farm tractors, stationary gasoline engines, road making machinery and other kinds of machinery to which the use of gasoline has become necessary and indispensable.

In said State the use of gasoline has become and is necessary not only to the operation of motor driven vehicles used in trade and commerce, but to automobiles used by business concerns, and by families for their health, comfort and convenience.

By the use of gasoline bus companies and other common carriers have become important factors in the daily commerce of the State. In practically every county of the State, bus lines are used, and these are rapidly taking the place of railroads in local public transportation.

The General Assembly of the State of Tennessee has within the present week enacted legislation upon the subject of bus companies as common carriers. Without the use of gasoline trade and commerce carried on and operated through the agency of gasoline will be irreparably injured. Transportation by bus companies, automobiles, trucks and other motor driven vehicles depends upon the opportunity and ability of the public to secure gasoline at reasonable prices.

During the year 1926 the State of Tennessee built and constructed ——— miles of public highway, and now has under contract and under contemplation of construction, additional ——— miles of highway. It is necessary in the building, operation and maintenance of its highways for the State to use, and the State does use, large quantities of gasoline, and the building and maintenance of said highways at reasonable cost and expense depends upon the ability and opportunity of the State to secure gasoline at reasonable prices.

In practically all of the municipalities of the State maintaining and operating fire departments, the use of gasoline

has become and is indispensable for the proper operation of engines and other machinery connected with said departments and devoted to the use and protection of the public.

In nearly all of the niney-five counties of the State of Tennessee, the rural school houses serve wide-spread areas, and experience has shown that many of the children in such areas have been unable to attend the public schools, particularly during the winter months, for lack of means of transportation, with the result that at this time, in more than half of the counties of Tennessee, motor driven vehicles, operated by gasoline are being used to carry and transport to such school houses the children of Tennessee in order that they may receive the benefits of at least a primary education.

Without the use of gasoline for such motor driven vehicles—which use has been induced by plaintiff and other gasoline refiners and dealers—the school busses and trucks cannot be operated, and the result to the school children of Tennessee would be hurtful beyond calculation, if the State fails to secure gasoline at reasonable and fair prices for said busses and trucks. Further, not only is the use of gasoline necessary to commerce and trade within the State of Tennessee, but in its use for private and family automobiles, it contributes largely to the promotion, not only of the convenience and comfort, but of the health of the people of Tennessee, and for such purposes it is essential that gasoline be secured at a fair and reasonable price.

It has become a very necessity in the transportation of commerce, on the farm and in all the economic and other social activities of life.

From such uses as have been hereinbefore referred to and others of which the Court will take cognizance, it is manifest that gasoline and the opportunity to secure the same at reasonable prices have become necessary in practically every department of human activity, having to do, or connected with the development of the resources of the State, with the proper exercise of governmental functions in the building and maintenance of roads and the furnishing of means of reaching and making accessible the public schools of the State—with intra-state travel and commerce, and with the comfort, health, welfare and prosperity of the people of the State of Tennessee, with the result that gasoline has become affected with a public interest and has in fact been devoted to the public use so that its regulation is not only proper, but has become imperative under conditions existing in the State of Tennessee, as hereinbefore set out.

The defendants aver that the plaintiff is, from the facts

hereinbefore set out and averred, aiding the Standard Oil group, composed of the Standard Oil Company of New Jersey, and the other allied Standard Oil Companies hereinbefore named, in absolutely dominating the entire oil industry including the manufacture, transportation and marketing of gasoline, and that in fact the plaintiff is dominated and controlled by the said Standard Oil group in maintaining the power to control, and the actual control of the marketing and sale of gasoline in Tennessee, and has been so aiding said group in controlling the refining and selling of gasoline from the production of crude oil at the well until it is placed on the market and sold to the consumers thereof in the State of Tennessee at extortionate, extravagant and unreasonable prices, and is the policy of said group to maintain such domination and control and maintenance of such prices as it may see fit to charge the consuming public in Tennessee.

Defendants state and aver that in the way and manner hereinbefore set out, the plaintiff is and has been for some years aiding the Standard Oil group to control the manufacture of gasoline by certain patents and alleged licenses; that the plaintiff, the Standard Oil Company of New Jersey, the Standard Oil Company of Indiana and the Standard Oil Company of New York, have an interlocking license system under which each of these companies has licensed to the other the right to manufacture gasoline. The Standard Oil Company, however, being dominant in these license, in as much as the Texas Company is restricted to certain territories, as to the amount it is permitted to manufacture in certain other territories, as has heretofore been shown. It is, therefore, clear that these dominant companies are in a combination with reference to the very source of this industry, and this combination necessarily affects the whole course of dealings from the production to the delivery to the consumer, and the plaintiff is a party to this combination having such effect upon the price of gasoline in Tennessee.

Defendants aver that the plaintiff ever since the date of its alleged domestication in Tennessee, by agreement and understanding with the said Standard Oil group, and by in fact acting in concert with the said group, has been and is a party to the policy of the said group to absolutely control the selling price of gasoline to the public in Tennessee, and in maintaining its power and practice to sell gasoline to the public at extortionate and unreasonable prices.

XI.

Each and every allegation of fact in said bill contained not hereinbefore admitted or denied, is now denied and proof demanded thereof.

XII.

The defendants aver that the Act of the General Assembly of the State of Tennessee challenged by the bill is binding upon the plaintiff in respect to all matters referred to and covered by said Act, and defendants deny that plaintiff is entitled to restrain or enjoin these defendants or any other officials of the State of Tennessee from fully enforcing the terms and provisions of said Act.

XIII.

And now having fully answered in so far as they are advised it is necessary or material for them to answer, these defendants pray that the restraining order heretofore granted by the Court be dissolved, and plaintiff's bill dismissed.

FRANK D. HALL,
Commissioner of Finances and Taxation.
L. D. SMITH,
Attorney General of Tennessee.
R. M. ATKINSON,
District Attorney of Davidson County.
L. D. SMITH, *Attorney General.*
CHARLES T. CATES, JR.
J. J. LYNCH,
H. N. LEACH,
Attorneys for Defendants.

STATE OF TENNESSEE,
COUNTY OF DAVIDSON.

Personally appeared before me, the undersigned Notary Public in and for and within the County and State aforesaid L. D. Smith, ————, and ————, who having been by me duly sworn, state that they are the defendants in the cause of the Texas Company, instituted in the United States District Court at Nashville, Tennessee, being No. 305 upon the Equity Docket of said court, and that the statements made in the foregoing answer are true and correct to the best of their knowledge, information and belief.

L. D. SMITH.

Subscribed and sworn to before me on this the 30th day of April, 1927.

T. G. SETTLE, *Notary Public.*
December 19th, 1910.

Exhibit No. 1

STATE EX REL ATTORNEY GENERAL,
vs.
STANDARD OIL CO. OF KENTUCKY.

Be it remembered that this cause came on to be heard on this the 6th day of March 1908, before the Honorable the Judges of the Supreme Court of the State of Tennessee, upon the transcript of the record from the Chancery Court of Sumner County, the assignments of error filed on behalf of the complainant and defendant, both of whom were appellants, and argument of counsel having been heard, and the Court being of the opinion that the assignments of error filed on behalf of the defendants, Standard Oil Company, are not well taken, and the same are therefore overruled; and the Court being of the opinion that there is no error in the decree of the Chancery Court of Sumner County, the same is therefore in all things affirmed.

Therefore, it appearing to the Court that the allegations of the original bill are sustained by the proof and that the defendants, Standard Oil Company and its agents, Comer, Holt and Rutherford, and S. W. Love, W. H. Love, J. C. Crow and L. C. Hunter, as alleged in said bill, unlawfully entered into an arrangement and agreement for the purpose and with the view of lessening full and free competition in the sale of defendants oil at Gallatin, and that such unlawful agreement and arrangements tend to and resulted in lessening and destroying full and free competition in the sale of defendants' oil at Gallatin, and tended to and resulted in advancing the price of said oil to defendants' customers at Gallatin; and it further appearing that the defendant, Standard Oil Company in entering into said unlawful arrangements and agreements violated the provisions of Section 1, of Chapter 140 of the Acts of 1903, and subjected itself to the penalty prescribed by Section 2 of said Act, applying to foreign corporations, it is accordingly so ordered, adjudged and decreed.

And thereupon the Court doth further order, adjudge and decree that the defendant, Standard Oil Company a foreign corporation, chartered and organized under the laws of the State of Kentucky, be and hereby is denied the right to do and prohibit from doing business within this State, and its license or permit to do business within this State, issued on the 21st day of September 1893, by the Secretary of State, be and hereby is cancelled and annulled, and said defendant Standard Oil Company, its managers, agents, servants and attorneys, are hereby perpetually enjoined and restrained from doing or carrying on business within this State; but nothing herein shall be construed to in any way

affect or apply to defendants' interstate commerce, or to prohibit it from engaging in interstate commerce, within this State.

The defendant Standard Oil Company and John J. Vertrees, its surety on prosecution bond, will pay all the costs of this Court for which execution may issue. The costs of the Court below will be paid as adjudged by the Chancellor.

The opinion of the Court is herewith filed and made a part of the record.

Thereupon, the defendant Standard Oil Company filed its petition for a rehearing, which, after due consideration by the Court, is overruled and disallowed.

Thereupon, the defendant Standard Oil Company, by and through its counsel gave notice in open Court that it would apply to the Chief Justice of this Court for a writ of error to this Court from the Supreme Court of the United States, to operate as a supersedeas.

OFFICE OF CLERK OF THE SUPREME COURT FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE:

I, DAVID S. LANSDEN, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the Decree of said Court, pronounced at its December Term, 1907, in case of State ex rel Attorney General, against Standard Oil Co., of Kentucky, as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the Capitol at Nashville, on this the 16th day of April, 1927.

DAVID S. LANSDEN, *Clerk.*

Exhibit No. 2

STATE OF TENNESSEE
VS.
STANDARD OIL COMPANY OF KENTUCKY.

This day came the Attorney General and presented to the Court the mandate from the Supreme Court of the United States, which is in the words and figures following, to-wit:

(Seal) UNITED STATES OF AMERICA, *ss*:

The President of the United States of America.

To the Honorable the Judges of the Supreme Court of the State of Tennessee, Greeting:

Whereas, lately in the Supreme Court of the State of Tennessee, before you, or some of you, in a case between the State of Tennessee, upon the relation of Chas. T. Cates, Jr., Attorney General of the State of Tennessee, complainant, and Standard Oil Company of Kentucky, defendant, wherein the judgment of the said Supreme Court, entered in said cause on the 11th day of April, A.D., 1908, is in the following words, viz:

"Be it remembered that this cause came on to be heard on this the — day of April, 1908, before the Honorable the Judges of the Supreme Court of the State of Tennessee, upon the transcript of the record from the Chancery Court of Sumner County, the assignments of error filed on behalf of the complainant and defendant both of whom were appellants and argument of counsel having been heard, and the Court being of the opinion that the assignments of error filed on behalf of the defendants, Standard Oil Company, are not well taken, the same are therefore overruled, and the Court being of the opinion that there is no error in the decree of the Chancery Court of Sumner County, the same is therefore in all things affirmed.

Therefore, it appearing to the Court that the allegations of the original bill are sustained by the proof and that the defendants, Standard Oil Company and its agents, Comer Holt and Rutherford, and S. W. Love, W. H. Love, J. C. Crow, and L. C. Hunter, as alleged in said bill, unlawfully entered into an arrangement and agreement for the purpose and with the view of lessening full and free competition in the sale of defendants' oil at Gallatin, and that such unlawful agreements and arrangements tended to and resulted in lessening and destroying full and free competition in the sale of defendants' oil at Gallatin, and tended to and resulted in advancing the price of said oil to defendants' customers at Gallatin; and it further appearing that the defendant, Standard Oil Company in entering into said unlawful arrangements and agreements violated the provisions of Section 1 of Chapter 140 of the Acts of 1903, and subjected itself to the penalty prescribed by Section 2 of said Act, applying to foreign corporations, it is accordingly so ordered, adjudged and decreed.

And thereupon the Court doth further order, adjudge, and decree that the defendant Standard Oil Company, a foreign corporation, chartered and organized under the laws of the State of Kentucky, be and hereby is denied the right to do and prohibited from doing business within this State, and its license or permit to do business within this State issued on the 21st day of September, 1893, by the Secretary of State, be and hereby is cancelled and annulled,

and said defendant, Standard Oil Co., its managers, agents, servants and attorneys, are hereby perpetually enjoined and restrained from doing or carrying on business within this State, but nothing herein shall be construed to in any way affect or apply to defendants interstate commerce, or to prohibit it from engaging interstate commerce within this State.

The defendant, Standard Oil Company, and John J. Vertrees, its surety on prosecution bond, will pay all the costs of this Court, for which execution may issue. The costs of the Court below will be paid as adjudged by the Chancellor. As by the inspection of the transcript of the record of the said Supreme Court which was brought into the Supreme Court of the United States, by virtue of a writ of error agreeable to the Act of Congress in such case made and provided fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and nine, the said cause came on to be heard before the Supreme Court of the United States, on the said transcript of record, and was argued by counsel.

On consideration whereof. it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs; and that the said complainant recover against the said defendant, Standard Oil Company of Kentucky, for its costs, herein, expended and have execution therefor. May 2, 1910.

And the said is hereby remanded to you the said Judges of the said Supreme Court of the State of Tennessee, in order that such execution and proceedings may be had in the said cause, in conformity with the judgment and decree of this Court, above stated as, according to right and justice, and the Constitution and laws, of the United States, ought to be had therein, the said writ of error notwithstanding.

Witness the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, the 10th day of August, in the year of our Lord one thousand nine hundred and ten.

Costs of complainant..$.....Paid
Clerk .....$.....By
Printing record .....$.....
Attorney .....$.....defendant

JAS. H. MCKINNEY,
Clerk of Supreme Court of the U. S.

Thereupon, the Attorney General moved that this cause be reinstated upon the docket of this Court, and that the decree entered herein on the 11th day of April, 1908, be duly executed. And upon consideration of said motion, the Court is pleased to order, adjudge and decree that the same be sustained, and that this cause be reinstated upon the docket, and said decree of April 11th, 1908, being the final decree of this Court in this cause, is hereby reaffirmed and directed to be executed, and the costs of this cause will be paid as decreed in said decree of April 11, 1908, and to that end it is further decreed that the State of Tennessee have and recover of the defendant Standard Oil Company of Kentucky, and John J. Vertrees, surety on Appeal bond, all the costs of this cause, for which execution may issue.

OFFICE OF CLERK OF THE SUPREME COURT FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE

I, DAVID S. LANSDEN, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the decree of said Court, pronounced at its December term, 1910, in case of State of Tenn. against Standard Oil Company of Kentucky as appears of record now on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court, at office in the Capitol at Nashville, on this, the 16th day of April, 1927.

DAVID S. LANSDEN, *Clerk.*
April 11, 1908.

EXHIBIT No. 3.

TO THE HONORABLE THOMAS B. LYTLE, CHANCELLOR, ETC., HOLDING THE CHANCERY COURT AT MURFREESBORO, IN RUTHERFORD COUNTY, TENNESSEE:

THE BILL OF COMPLAINT OF:

CONSUMERS' SUPPLY COMPANY, a corporation organized and doing business under the laws of Tennessee, with its place

of business in the City of Murfreesboro, in Rutherford County, State of Tennessee;

J. D. HUTTON, a resident and citizen of Shelbyville, in Bedford County, Tennessee;

W. D. HUDSON, a resident and citizen of Clarksville, in Montgomery County, Tennessee, doing business at Clarksville, in the name of Clarksville Oil Company;

E. E. JOHNSON and W. J. DALE, residents and citizens of Columbia in Maury County, Tennessee, doing business as the Columbia Oil Company;

A. L. JOHNSON, a resident and citizen of Pulaski, in Giles County, Tennessee, who, with the said E. E. Johnson is doing business in Pulaski, as the Pulaski Oil Company;

THE VALLEY OIL COMPANY, a Tennessee Corporation, doing business at Memphis, Shelby County, Tennessee;

THE BENZOL GAS CORPORATION, a Tennessee corporation, doing business at Nashville, Davidson County, Tennessee;

THE ESTES-COOPER OIL COMPANY, a Tennessee corporation, doing business at Nashville, Davidson County, Tennessee;

THE THOMPSON OIL COMPANY, a Kentucky corporation, doing business at Nashville, Tennessee;

THE ELK OIL COMPANY, a Tennessee corporation, doing business at Fayetteville, Tennessee;

SANFORD GARNER, a resident and citizen of Covington, in Tipton County, Tennessee;

THE CONSUMERS OIL COMPANY, a Tennessee corporation, doing business at Winchester in Franklin County, Tennessee;

B. E. DIGGS, a resident and citizen of Paris, in Henry County, Tennessee, doing business as the Paris Oil Company;

THE NASHVILLE OIL COMPANY, a Tennessee corporation, doing business at Nashville, in Davidson County, Tennessee;

H. N. MOORE, a resident and citizen of Dresden, in Weakley County, Tennessee, doing business in the name of the Dresden Oil & Gas Company;

C. E. DAVIS, a resident and citizen of Dyersburg, in Dyer County, Tennessee, doing business under the name of Tennessee Oil Company;

MARK H. SENTER, a resident and citizen of Chattanooga, in Hamilton County, Tennessee, doing business in the name of Southeastern Oil Company;

J. M. LASSING, A. P. CARVER, J. N. GUTHRIE and T. B. GENNINGS, residents and citizens of Davidson County, Tennessee, doing business under the name of Peerless Oil & Gas Company;

THE COOK SERVICE STATION, a Tennessee corporation, doing business in Rutherford County, Tennessee;

Exhibit No. 3 to Motion to Dismiss and Answer

A. P. STEPHENSON, a citizen and resident of Hamilton County, Tennessee, doing business under the name of Stephenson Service Station;
THE OBION OIL COMPANY, a Tennessee corporation, doing business at Union City, in Obion County, Tennessee;
E. F. PEEK, a citizen and resident of Athens, in McMinn County, Tennessee, doing business as the Crystal Oil Company, at Athens, McMinn County, Tennessee;
A. L. NEELEY, a citizen and resident of Columbia, in Maury County, Tennessee; and
ABEEL BROTHERS, a Tennessee corporation, doing business at Chattanooga, Hamilton County, Tennessee,

Complainants,

VERSUS

STANDARD OIL COMPANY OF LOUISIANA, a corporation organized under the laws of the State of Louisiana;
SINCLAIR REFINING COMPANY, a corporation organized under the laws of the State of Maine;
THE TEXAS COMPANY, a corporation organized under the laws of the State of Texas;
THE GULF REFINING COMPANY OF LOUISIANA, a corporation organized under the laws of the State of Louisiana;
THE PAN-AMERICAN PETROLEUM & TRANSPORT COMPANY, a corporation, organized under the laws of the State of Delaware;
THE MEXICAN PETROLEUM CORPORATION OF LOUISIANA, a corporation, organized under the laws of the State of Louisiana;
THE PRODUCERS & REFINERS CORPORATION OF TENNESSEE, a corporation, organized under the laws of the State of Tennessee, with its principal office in Memphis, Shelby County, Tennessee.

The foreign corporations herein named as defendants are all doing business in Tennessee, having gone through the form of complying with the foreign corporation laws of Tennessee.

Defendants.

THE COMPLAINANTS WOULD RESPECTFULLY SHOW THE COURT:

I.

That the complainants herein named, who are doing business as The Valley Oil Company, The Consumers Supply Company, the Columbia Oil Company, the Benzol Gas Corporation, The Estees-Cooper Oil Company, the Thompson

Oil Company, Sanford Garner, Pulaski Oil Company, the Elk Oil Company, The Consumers Oil Company, The Peerless Oil & Gas Company, Dresden Oil & Gas Company, Southeastern Oil Company, Tennessee Oil Company, Nashville Oil Company, Abeel Brothers, Clarksville Oil Company, The Dyersburg Oil Company, The Crystal Oil Company, The Paris Oil Company and The Obion Oil Company, are conducting in the places set out in the caption, respectively, business as wholesale dealers or jobbers in gasoline. They purchase gasoline from the refiners in what is known as tank car lots. Until recently a great many of the complainants made what was termed marginal contracts, that will be hereinafter explained more fully. The business of the complainants is to sell to operators of service stations, and through these service stations gasoline is sold directly to the consumers. The rapid increase in the use of automobiles and trucks in the State of Tennessee has created a great demand, and a rapidly increasing demand for oil and gasoline, and this is now becoming a very important business in the State of Tennessee. Some of the complainants enumerated under this paragraph are also engaged in the retail business, by operating service stations as set out in the next paragraph.

II.

The following complainants are engaged in the sale of gasoline at retail, by the operation of service stations at the places set out respectively in the caption: A. L. Neeley, The Stephenson Service Station, the Cook Service Station, Estees-Cooper Oil Company, Southeastern Oil Company, Thompson Oil Company, Benzol Gas Corporation, Abeel Brothers, and Peerless Oil & Gas Company.

III.

Complainants would now show the Court that the Standard Oil Company of Louisiana is in form a Louisiana Corporation; but was organized, all of its stock is owned, it is operated, dominated and controlled absolutely by the Standard Oil Company of New Jersey, a corporation organized in the following manner for the following purposes:

In 1870 John D. Rockefeller, William Rockefeller, Samuel Andrews, Henry W. Flagler and Stephen W. Harkness, organized the Standard Oil Company of Ohio. Between the time and April 1879, in connection with Henry H. Rodgers, John D. Archibald, O. M. Payne, C. M. Pratt, they acquired control of more than forty competitive refineries. In April of 1879, the stock of the said Standard Oil Company, as well as that of its subsidiaries referred to was placed in the

hands of three trustees, and on the 2nd day of January, 1882, a new trust agreement was entered into, under which the parties mentioned understood to control and dominate the oil industry of the United States, and in order to do this, they authorized the trustees to organize subsidiaries to be known as Standard Oil Companies of several different states in the Union. This trust agreement was declared illegal by the Supreme Court of Ohio, and in order to evade the effect of this decree the same parties organized the Standard Oil Company of New Jersey, and had conveyed to it the stock of all of these parties, and thereafter all of the various Standard Oil Companies in the United States were owned, dominated and controlled by the said Standard Oil Company of New Jersey. This continued until the Supreme Court of the United States, in a proceeding instituted by the Government of the United States, declared the business thus conducted by the Standard Oil Company of New Jersey, in operating and controlling the oil business of the country through the instrumentalities of the Standard Oil Companies mentioned, and their subsidiaries, set out in the decree of that court, to be an illegal combination in restraint of the laws of the United States, and the combination was ordered to be dissolved. This decree was entered by the Supreme Court of the United States in May, 1911.

IV.

While this proceeding was pending in the Supreme Court of the United States, the Standard Oil Company of Kentucky, one of the subsidiaries of the Standard Oil Company of New Jersey, owned, dominated and controlled by the Standard Oil Company of New Jersey, as hereinbefore set out, was made a defendant to an ouster proceeding instituted by the Supreme Court of Tennessee, said Standard Oil Company of Kentucky having domesticated in the State of Tennessee, and at its December term, 1907, the Supreme Court of Tennessee, decided that the said Standard Oil Company of Kentucky had been violating the anti-trust statutes of the State of Tennessee, and conducting its business in an unlawful and improper manner, and entered a decree ousting from the State and enjoining the said Company, its agents, employes, etc., from continuing to do business in this State. The case was appealed to the Supreme Court of the United States, and by that Court affirmed. In order to meet this situation, the Standard Oil Company of New Jersey, that had been doing business in Tennessee under the name of its subsidiary, the Standard Oil Company of Kentucky, went through the form of organizing a corporation in the State of Louisiana, called the Standard Oil Company

of Louisiana, and thereupon filed its charter and went through the form of complying with the corporation laws of the State of Tennessee, concealing from the officials of the State of Tennessee the fact that the pretended Standard Oil Company of Louisiana was in substance and in fact the same corporation as had been ousted from the State and enjoined from doing business in the State, and concealing from the officials and people of Tennessee the fact that the Standard Oil Company of New Jersey was doing business prior to the ouster proceeding in the name of the Standard Oil Company of Kentucky, and proposed to continue to do business in violation of the decree and injunction of the State in the name of the Standard Oil Company of Louisiana. By virtue of this deception, the said Standard Oil Company of New Jersey continued and has ever since that time continued to do business in the State of Tennessee. No change whatever was made in the control or management of the property, the business, nor in the personnel of its officials nor employes in the State. Its agents and officers simply had the word "KY.," that followed the name of "Standard Oil Company," erased and the word "LA.," substituted therefor, and this was the only respect that was ever paid to the decree and injunction of the Supreme Court of Tennessee.

V.

The Supreme Court of the United States held that the Standard Oil Company of New Jersey and its subsidiaries were doing business in violation of the statutes of the United States because they had divided up this country and allotted to each of the companies certain parts of the territory, so that there would be no competition between the various companies; and wherever real competition was attempted from independent sources the said Standard Oil Company would organize and operate subsidiary companies and buy out other companies to assist the Standard Oil Company that occupied that particular territory, and with these instrumentalities, by rebating, price cutting, and other improper methods destroyed and crippled competition for the purpose of dominating and controlling the oil industry.

The complainants would further show, that after the entry of the decree of the Supreme Court of the United States it is possible that some of the stock held by the Standard Oil Company in the subsidiary corporations, was restored to the equitable owners, that is to say, restored to John D. Rockefeller and his associates to hold for themselves, instead of being held in trust. But, if this was done, no other respect appears to have ever been shown to the decree of the Supreme Court, because the various subsi-

diaries continued in the combination theretofore existing for the control and domination of the oil industry in the United States. No two Standard Oil Companies in the United States now occupy the same territory or compete with each other. By virtue of said combination between the Standard Oil Company of New Jersey and its subsidiary, the Standard Oil Company of Louisiana, the Standard Oil Company of Indiana, the Standard Oil Company of Ohio, and various other Standard Oil Companies, one of these other Standard Oil Companies come into the State of Tennessee, or do business in this State; in other words, the people of Tennessee are deprived entirely of this legitimate competition that would result if these companies were not in this illegal combination.

Proceedings are now pending before the Federal Trade Commission against the Standard Oil Company of New Jersey, charging that it is violating the laws of the United States and is attempting to monopolize the oil industry, and one of the methods charged is that it owns and operates as a subsidiary, the Standard Oil Company of Louisiana, and has recently purchased a controlling interest in the Humble Oil & Refining Company, a Texas Corporation. The Standard Oil Company of New Jersey in that proceeding answered and admitted that it organized, owns, dominates and controls the Standard Oil Company of Louisiana, and that it in like manner had recently purchased a controlling interest and in that way the control of the Humble Oil & Refining Company referred to.

VI.

Until recently there has been operating in the Southwestern territory of the United States, including the State of Tennessee, the defendant, Pan-American Petroleum & Transport Company, a large oil refining corporation, which operates and sells under different trade names, but which controls and dominates the business of these subsidiaries. In order to enable the Standard Oil Company to further monopolize the oil and gasoline trade of this territory, it was desirable to have this competition removed. The Standard Oil Company of New Jersey and the Standard Oil Company of Louisiana were already under charges before the Federal Trade Commission. It is therefore obvious that it was necessary to have this competition removed through another source. The Standard Oil Company of Indiana, therefore, has recently purchased the control of this defendant, Pan-American Petroleum & Transport Company, and it is now being operated as a subsidiary to the Standard Oil combination and in perfect harmony with the Standard

Oil Company of Louisiana, and the people of Tennessee are therefore deprived of this competition.

VII.

The defendant, Gulf Refining Company of Louisiana operates a large refinery in the State of Texas, and perhaps in other places, and until the matters hereinafter complained of, it has been supposed to have been an independent corporation.

VIII.

The Texas Company of the U. S. A., owns and operates large refineries in Texas and perhaps in various other states. In like manner it has for sometime been selling gasoline in the State of Tennessee and until recently has been supposed to be entirely independent of the Standard Oil Company, except in the matters hereinafter to be referred to.

IX.

The Sinclair Refining Company, owns and operates refineries in the states of Louisiana, Texas and possibly in other places. The complainants do not know as to the stock ownership of this company, but it is operated in entire harmony with the Standard Oil Company, and complainants are advised and charge upon information and belief that it is operated as a subsidiary of the Standard Oil Company.

X.

The Producers & Refiners Corporation is a dummy corporation, owned and operated by the subsidiaries of the Standard Oil Company, to-wit, the Producers & Refiners Corporation of Parko, Wyoming, which, in turn is owned and controlled by the Standard Oil Company.

XI.

The complainants would now show the Court, that by virtue of the combination between the Standard Oil Company of New Jersey, and the other Standard Oil Companies organized in the manner hereinbefore set out, the said Standard Oil Companies in combination are able to, and do dominate, control and fix wholesale and retail prices of gasoline throughout the United States, and especially in the State of Tennessee, and surrounding territory.

XIII.

The other defendants herein named are now and for sometime have been aiding the various Standard Oil Companies in the exercise of this unlawful authority and power of control, and dominating these prices in the following manner:

They have established a system of selling by what is known as "marginal contracts," that is to say, when they make a contract with a jobber, engaged in the wholesale gasoline business, they provide that the price shall be based upon the Standard Oil Company's tank wagon prices on the day of delivery. For instance, if the sale is made to a jobber in Murfreesboro, the contract will recite that the price shall be a certain number of cents less per gallon than the Standard Oil Company's tank wagon prices on the day of delivery in Murfreesboro. There are three prices maintained: (a) the wholesale price to the jobber, which is known as the "tank car price"; (b) what is known as the "tank wagon price"; and, (c) the "service station price." The profit to the jobber consists in the differential between the tank wagon price and the price at which the refiner sells to him in tank car lots. For instance, if the marginal contract provides that the jobber shall pay the refiner three cents per gallon less than the Standard Oil Company's tank wagon price on the day of delivery, and the tank wagon price on the day of delivery is eighteen cents per gallon; then the jobber pays the refiner fifteen cents per gallon, and the three cent differential is his gross profit; out of which, of course he must pay his overhead and expense of operation. The difference between the tank wagon prices, or the prices which operators of service stations are required to pay the jobbers and the service station price, is the profit to the operator of the service station; for instance, if the tank wagon price is eighteen cents, and the retail service station price is twenty-one cents, then this differential of three cents per gallon is the profit made by the operator of the service station, out of which, he, of course, must pay his overhead and operating expense.

Complainants are advised and charge that by virtue of the strength given to the Standard Oil Company by the combination among themselves, and the support given to their price fixing by the defendants herein and other refineries who are willing to aid and promote the Standard Oil Company in the exercise of its right to fix prices, the dealers and consumers of Tennessee are at the mercy of the Standard Oil Company on the question of prices of gasoline. However, the prices fixed by the Standard Oil Company under which the complainants and other dealers in

Tennessee have been compelled to buy and sell gasoline, have been such, while the differentials herein referred to have been maintained, to permit them to carry on their business in a legitimate manner, yet the profit has been small.

XIV.

As stated, the increase in the use of automobiles and trucks in Tennessee and other parts of the country has increased so rapidly that business men all over Tennessee have been organizing independent marketing companies, that is to say, jobbing and retail companies for the purchase and sale of gasoline. This has grown to be quite an industry in almost every county in Tennessee.

XV.

All of said defendants herein set out, are not only refiners and doing a business of refining and selling in tank car lots, but they have entered the field as jobbers, and the defendants, Standard Oil Company, Pan-American Petroleum & Transport Company, The Gulf Refining Company of Louisiana, The Producers & Refiners Corporation of Tennessee, have begun operating service stations and selling at retail. And, in order to lessen and destroy competition in Tennessee, and especially to destroy the competition that comes from the independent local dealers throughout the state, both as jobbers and operators of service stations, they have entered into the unlawful combinations and agreements hereinafter set out:

(1) The Standard Oil Company of Louisiana, as has heretofore been charged, under the domination and control of its owner, the Standard Oil Company of New Jersey, combined with the Standard Oil Company of Kentucky, the Standard Oil Company of Ohio, the Standard Oil Company of Indiana, and all of the other subsidiaries of the various Standard Oil Companies, fix and control the price of gasoline in the State of Tennessee and keep out competition from the other companies named, and have allotted and divided among themselves the territory in the United States in which each of said companies will operate to more perfectly carry out this plan and purpose to dominate and control the gasoline business in the United States.

In order to more perfectly effectuate this purpose, the said Standard Oil Company of Louisiana has recently combined with its general manager in the City of Memphis, and its local managers in the Cities of Nashville, Murfreesboro, Chattanooga, Clarksville, Columbia, Pulaski, Fayetteville, Winchester, Dresden, Covington, Dyersburg, Athens, Paris,

Morristown and various other cities and counties in which it operates and does business in the State of Tennessee, and as a result of this combination it has abolished the differential heretofore maintained under and by virtue of which the independent jobbers and retail dealers have been able to carry on their business. Exercising the unlawful power to fix prices, both wholesale and retail, it has been for the last few months, and is now, selling its gasoline at tank wagon prices to retail dealers, at the same price at which it sells gasoline to the wholesale jobber, and in turn it is selling through its service stations to consumers throughout the state at retail, its gasoline at the same price it sells the gasoline at wholesale to the jobber. In other words, the jobber whose business it is to sell to the retailer, must pay to the Standard Oil Company, the fixer of prices in Tennessee, the same prices at which the purchaser from it sells to the public. It is, therefore, obvious, that the jobber must operate at a loss, because he must bear his own overhead and operating expense, and he cannot sell either at wholesale or retail and make a profit, because the Standard Oil Company is in the market, selling at retail, at the very price it sells to the jobber. In the same manner, the operator of the service station who sells at retail, must operate at a loss, because if he sells at all, he must sell at the same price at which he purchases, and bear his own overhead and operating expense. Therefore, the independent jobber and retailer must either meet the prices fixed by the Standard Oil Company, and operate at a loss, or lose all his trade and quit business. In other words, it means bankruptcy or the abandonment of his business and the absolute destruction of competition.

XVI.

It is true that the independent jobbers have a right, of course, to purchase on the open market, but the Standard Oil Company is now selling at retail in Tennessee to the consumer at the same price which the complainants and other jobbers in Tennessee must pay to any of the other defendants herein named, or any other refiner, when purchasing on the open market in car load lots or otherwise.

XVII.

The Gulf Refining Company of Louisiana, has in like manner entered into a combination with its general manager in Tennessee, and its local managers in the cities above named and in all places in Tennessee in which it does business, for the purpose of aiding the Standard Oil Company in the destruction of competition in Tennessee, and in ruin-

ing the business of the complainants and other independent dealers operating in the State.

XVIII.

And the said Gulf Refining Company of Louisiana, in like manner is now, and for several months has been selling to the service stations at the prices at which the Standard Oil Company is selling to retailers; and the Gulf Refining Company in like manner demands and will only sell to the jobber in Tennessee at the said retail prices.

XIX.

In like manner the Sinclair Oil Company has entered into a combination and conspiracy with its general manager in Tennessee and its local managers at Chattanooga and other places that it operated, as a result of which it is aiding the Standard Oil Company in maintaining its unlawful combination and its unlawful price fixing as herein set out, and is aiding and abetting the Standard Oil Company in its purpose to destroy competition in Tennessee, and in like manner is selling gasoline to the operators of service stations at the same or less price that it sells to jobbers at wholesale, or at which the Standard Oil Company and other companies are selling.

XX.

And, in like manner The Texas Company of the U. S. A., is in combination with its general manager in Tennessee, and its local agents in Chattanooga, Nashville, Memphis and other places in Tennessee, for the purpose of aiding the Standard Oil Company in fixing the prices of gasoline, and in destroying competition in this state; and it is selling its gasoline at the same prices and in the same manner as the Standard Oil Company.

XXI.

The Pan-American Petroleum and Transport Company, is in like manner operating in combination with the Standard Oil Company, and is a subsidiary. It is aiding the Standard Oil Company in its combination to destroy competition in Tennessee in the manner hereinbefore set out, and is in combination with its own managers and agents in Tennessee to carry this into effect.

XXII.

In like manner the Producers and Refiners Corporation of Tennessee, is, as stated, a subsidiary of the Standard Oil

Company, and is operating in this State only for the purpose of aiding the Standard Oil Company to carry out the unlawful combinations herein set out.

XXIII.

The purpose and effect of the unlawful practices herein set out, is not only to destroy competition, but to destroy the business of these complainants and others operating in like manner. The history of the Standard Oil Company is that when it has destroyed competition it raises its prices and the public is made to suffer accordingly and that is the ultimate purpose in this case.

XXIV.

In stating that these defendants have been selling and are selling at wholesale at the same price at which they are selling at retail, complainants would show that at times the wholesale price is a fraction less than the retail price and some times a fraction more than the retail price, because the price is fixed at the refinery, with freight and taxes added, so that the prices fixed in such manner as that, when the freight and taxes are added, it will be substantially the retail price, and as stated, it sometimes varies a fraction either way, but not materially so. The result being that the complainants and all other independent dealers in Tennessee are operating at a loss, and as a result of the illegal operations herein set out.

XXV.

The differentials between what are known as the tank car or refinery prices, the tank wagon or jobbers prices, and the retail or service station prices, has heretofore been maintained in this state, as heretofore stated, for many years and are maintained all over the United States, as the only basis at which independent dealers may operate at all under existing conditions, throughout the United States, on account of the domination of prices by the Standard Oil Company, its subsidiaries and allies.

Recently, since the unlawful purpose has developed on the part of these defendants to destroy all independent business in Tennessee all these defendants have declined to make any further marginal contracts, or to make any contracts for future delivery at all, and complainants and all other dealers must now purchase on the open market, unless, as exists in a few instances, some of the marginal contracts have not yet expired. These contracts, however, will soon

expire and even in these few instances the independent jobbers will, like the other independent jobbers, be at the mercy of these defendants. And, as stated, when buying on the open market, as the independent jobbers must do, he can only buy at the same prices at which he must sell, either to the operators of service stations or to the public, and as stated above, the independent jobbers and independent operators of service stations are now having their business destroyed by the illegal combinations herein complained of.

XXVI.

Carrying out the unlawful purpose hereinbefore set out, —to destroy competition in Tennessee in violation of the Tennessee Anti-Trust Act, these defendants, in combination between themselves, their various agents and managers, as hereinbefore set out, have been, by virtue of the said arrangement, agreement, or understanding, selling gasoline in tank wagon and retail lots at the regular Standard Oil wholesale, or tank car prices, for the purpose, as stated, of lessening or destroying competition in the gasoline business in the State of Tennessee. This they have accomplished in some instances by directly selling at retail through service stations at the wholesale tank car prices, and in some instances they have done this by indirection and subterfuge, by granting rebates, and other subterfuges, but they have all reached the same end, as hereinbefore set out, all of which is done with the evil purpose and with the evil effect hereinbefore set out.

Complainants charge that the injury to their business has been, and is continuing to be, great and irreparable, and they have no adequate remedy save in a court of equity.

XXVII.

Complainants charge that the differential, as hereinbefore described, between the tank car price and the tank wagon price, and between the tank wagon price and the service station price have been maintained all over the United States by the trade generally, and by the defendants for many years, and that such differentials are now being maintained in all parts of the United States except in the State of Tennessee, and that said differentials have been destroyed temporarily only in this state for the purpose of destroying the business of complainants and others engaged in like business.

Complainants charge that the usual and customary differential maintained in this state for many years is three (3) cents difference between the service station price and

the tank wagon price, and three (3) and four (4) cents difference between the tank wagon price and the tank car price, the latter being the price at which gasoline is sold by the refineries to the jobbers.

XXVIII.

The Mexican Petroleum Company of Louisiana is a subsidiary of the said Pan-American Petroleum & Transport Company. It operates in the State of Tennessee merely as a convenience in aid of the business of the Pan-American Petroleum & Transport Company, and is a party to, and has been, and is now engaged in aiding the said Pan-American Petroleum & Transport Company in the unlawful combination and conspiracy herein described.

PREMISES SEEN, COMPLAINANTS PRAY:

That the defendants set out in the caption be made such by the proper process of this Court, returnable to the next rule day of this Court.

Let process issue to the Sheriff of Rutherford County for the defendants Standard Oil Company of Louisiana, The Texas Company, and the Gulf Refining Company of Louisiana; and to the Sheriff of Shelby County for the defendants Pan-American Petroleum & Transport Company, the Mexican Petroleum Corporation of Louisiana, and the Producers & Refiners Corporation of Tennessee; and to the Sheriff of Hamilton County for the defendant Sinclair Refining Company. Let the defendants answer but not under oath.

Let an injunction issue restraining the defendants, each and all of them, their agents and employes, allies and subsidiaries, from continuing the unlawful practices herein set out and described.

Let said defendants, each of them, their agents, employes, subsidiaries and allies, as herein described, be enjoined from continuing the sale of gasoline, either in tank car lots, tank wagon lots, or at retail through service stations, or otherwise, without maintaining the usual customary or reasonable differential between the price at which gasoline is sold in tank car lots and in tank wagon lots, and between the price at which gasoline is sold at tank wagon lots and at retail.

Let them all be restrained from continuing the unlawful practices hereinbefore set out by way of rebates or other subterfuges.

Upon the final hearing decree that the action of these defendants as herein set out has been a violation of the anti-

trust laws of the State of Tennessee and a violation of the rights of these complainants.

Let the injunction herein prayed be made perpetual.

Grant all other, further and special relief to which the complainants may be entitled, and grant general relief.

This if the first application for a writ of injunction in this cause.

THOS. N. GREER,
J. J. LYNCH,
J. G. PHILLIPS,
Solicitors for Complainants.

STATE OF TENNESSEE,
COUNTY OF HAMILTON.

Personally appeared L. D. McKnight, President of the Consumers' Supply Company; A. H. Alexander, Vice-President, Valley Oil Company; R. P. Estes, President of the Estes-Cooper Oil Company; Mark H. Senter, President Southeastern Oil Company; J. M. Lassing, W. D. Hudson, Joseph Rosenfield, President Benzol Gas Corporation; B. E. Holdman, Secretary-Treasurer Elk Oil Company and President of the Consumers' Oil Company; H. A. Thompson, Secretary-Treasurer, Thompson Oil Company; C. M. Abeel, President, Abeel Brothers; E. E. Johnson, before the undersigned authority and made oath in due form of law that the facts stated in the foregoing bill are true when stated as of their own knowledge, and those stated upon information they verily believe to be true.

E. E. JOHNSON,
H. A. THOMPSON,
W. D. HUDSON,
R. H. ALEXANDER,
JOSEPH ROSENFIELD,
J. M. LASSING,
C. M. ABEEL,
R. P. ESTES,
AL D. MCKNIGHT,
B. E. HOLDMAN,
MARK H. SENTER.

Sworn to and subscribed before me this 2nd day of January, A.D. 1926.

CHAS. M. FAIN, *Notary Public.*

To the Clerk & Master at Murfreesboro:

Upon the execution of bond in the sum of Five Thousand Dollars ($5,000.00) conditioned as required by law issue the writ of injunction as prayed in the bill restraining the defendants from selling gasoline in the State of Tennessee

either in tank car lots, tank wagon lots, retail or otherwise without maintaining (and selling at) a reasonable, usual and customary differential as described in the bill, between the price of gasoline sold in tank car lots and tank wagon lots and that sold in tank wagon lots and at retail. And from conveying out the combination alleged in the bill by subterfuges or otherwise, directly or indirectly.

This January 4, 1926.

FLOYD ESTILL, *Judge.*

EXHIBIT No. 4.

IN THE CHANCERY COURT OF RUTHERFORD COUNTY, TENNESSEE.

CONSUMERS SUPPLY COMPANY, ET ALS, *Complainants,*
vs.
STANDARD OIL COMPANY OF LA., ET ALS, *Defendants.*
No. 1488-Q

The Separate Answer of the Standard Oil Company of Louisiana, One of the Defendants in the Above Styled Cause.

The Standard Oil Company of Louisiana, one of the defendants in the above styled cause, not waiving its right to object and except to the original bill herein, for its many errors and insufficiencies, but expressly reserving same and answering only so much and such parts of such bill as it is advised it is material and proper for it to answer, says:

I.

Respondent is not advised as to the corporate or non-corporate character of the various complainants nor is it definitely advised as to the nature and character of the

business in which they are engaged, and therefore, calls for strict proof of the allegations of the bill in those respects.

II.

Whether the nine complainants referred to in paragraph 2 of the bill as being engaged in the sale of gasoline at retail by the operation of service stations at certain places are so engaged respondent is not definitely advised and therefore, calls for strict proof of the averments of the bill in this respect.

III.

Respondent admits that it is a corporation organized and existing under the laws of the State of Louisiana but it denies that all of its stock is owned by the Standard Oil Company of New Jersey. It denies that it is "operated, dominated and controlled by the Standard Oil Company of New Jersey."

It avers and does believe that so much of the third paragraph of the bill as relates to the organization and history of the Standard Oil Company of New Jersey is not material or pertinent in this cause and denies the correctness of the statements in the third paragraph of the bill in those particulars.

It does not deny, however, that there was a proceeding which resulted in a final decree of the Supreme Court of the United States affecting the organization known as the Standard Oil Company of New Jersey, but the truth as to the nature and character of those proceedings, including the final decree therein, can only be determined from the record in that cause and therefore, respondent demands strict proof of that record.

IV.

Respondent does not deny that proceedings were instituted by the Attorney General of the State of Tennessee against the Standard Oil Company of Kentucky which resulted in a decree at the December, 1907, term of the Supreme Court of Tennessee, ousting that company from the State of Tennessee and that such decree was affirmed thereafter by the Supreme Court of the United States. Respondent, however, refers to the record in that proceeding for a correct history thereof and denies that the proceeding in that cause, or the result thereof, are of any pertinence in the present litigation. Particularly, respondent denies that it had any connection with the Standard Oil Company of Kentucky or with the matters and things involved in the so-called ouster proceeding by the State of

Tennessee. Respondent also denies that in order to meet the situation resulting from the ouster of the Standard Oil Company of Kentucky from Tennessee this respondent was organized as a corporation to take its place, the fact being as respondent now particularly avers, that it was an organization and going corporation engaged in the business of proceedings, refining, selling and distributing petroleum some time prior to the final decree in the said ouster proceeding. Respondent denies that its entry into the State of Tennessee was merely a continuance of the alleged conduct of business in Tennessee, by the Standard Oil Company of New Jersey. The fact is, that respondent's entry into Tennessee was made in the usual and ordinary course after a compliance with all of the requirements of the laws of Tennessee. The very name of the respondent indicated its business association. It purchased the physical properties in Tennessee of the Standard Oil Company of Kentucky on or about May 11, 1910, and thereafter has continued to do business in Tennessee in the handling of petroleum products all over the State. This was done with the full cognizance of every official in Tennessee and without objection from any source. It was done after full compliance with the laws of Tennessee.

V.

Respondent is advised that the averments of this paragraph with respect to the proceedings which eventuated in a final decree of the Supreme Court of the United States, which proceedings were aimed at the Standard Oil Company of New Jersey, and charged violation of the anti-trust laws of the United States, are not material in the present litigation. Whether material or not, the truth as to the nature and character of those proceedings and the ultimate result thereof can only be properly known from an examination of the record therein and if the matter is material, respondent insists upon a strict and proper proof thereof.

It is not true, however, and respondent particularly denies that "no two Standard Oil Companies in the United States now occupy the same territory or compete with each other." It is enough in this connection for respondent to point to the bill itself in which it is averred, that the Standard Oil Company of Indiana dominates and controls a company known as the Pan-American Company, which is an active competitor of respondent in the State of Tennessee.

Respondent further says, with respect to the charges in paragraph V of the bill, that proceedings are now pending before the Federal Trade Commission against the Stand-

ard Oil Company of New Jersey to the effect that it is violating the laws of the United States and attempting to monopolize the oil industry, in which proceedings it is alleged that this respondent is operated as a subsidiary by said New Jersey corporation; respondent denies the materiality of those charges in this cause, and says that whether material or not, the only proper proof in the matter is the record of that proceeding and therefore, demands strict proof of the allegations of the bill in this respect. This respondent, however, further denies that it is in any respect engaged in an unlawful business or in an unlawful way in Tennessee but on the contrary, insists and avers that it is observing every requirement of the laws of Tennessee.

VI.

With respect to this paragraph of the bill, which refers to the Pan-American Petroleum and Transport Company, respondent says that it has no concern with these allegations and leaves the corporation, therein referred to, to make its own answer. Respondent, however, here avers that there is a corporation operating very widely in Tennessee, in petroleum products business, handling what is known as the Pan American Petroleum Products and that said corporation is an active and emphatic competitor of this respondent in the sale of petroleum products in Tennessee. With said corporation this respondent had no alliance or connection whatever, the two companies being as separate and unallied as two companies could be.

VII.

This paragraph relates to the Gulf Refining Company of Louisiana, a co-defendant herein, and respondent leaves it to that company to make its own answer.

Respondent, however, states that the Gulf Refining Company of Louisiana deals very largely in Tennessee in petroleum products and that it is probably the largest competitor of this respondent in Tennessee. The competition between said Gulf Refining Company and this respondent is keen and there is no connection or alliance between them in any respect nor has there ever been.

VIII.

With respect to this paragraph of the bill, which refers to the Texas Company of the U. S. A., respondent merely says that it is true that said Texas Company owns and operates large refineries in Texas and perhaps in other States,

and that it is a large dealer in gasoline and other petroleum products in Tennessee. It is an active competitor of this respondent and there exists no alliance or confederation of any sort between said Texas Company and this respondent, nor has such alliance or confederation ever existed. On the contrary, they are now and have been, keen and active competitors in the markets of Tennessee and elsewhere.

IX.

With respect to this paragraph which refers to the Sinclair Refining Company, this respondent merely says that so far as it is affected by such allegation, if at all, it demands strict proof. However, respondent particularly and emphatically denies that said Sinclair Refining Company is "operated in entire harmony with" this respondent and emphatically denies that same is operated as a subsidiary of this respondent.

X.

With respect to this paragraph which refers to Producers and Refiners Corporation, respondent says that so far as it is affected by same it demands strict proof of the allegations of the bill. Respondent denies emphatically that said Producers and Refiners Corporation is under its domination or control, in any respect. The fact is, that to the extent of its limited operations the said Producers and Refiners Corporation is a competitor of this respondent.

XI.

Respondent denies all and singular the allegations of this paragraph. It is not true in any respect that "the said Standard Oil Company in combination are able to and do dominate and fix wholesale and retail prices of gasoline throughout the United States, and especially in the State of Tennessee and surrounding territory."

This respondent further says that it does not dominate, control or fix, or attempt to do so, the wholesale or retail price of gasoline or any other petroleum products in Tennessee or elsewhere, but seeks merely, as it has always sought, to engage in the business of handling petroleum products in Tennessee, in strict accordance with the laws of Tennessee and the Federal Government.

XIII.

With respect to the charges in this paragraph, respondent says that it has never engaged in the practice of mak-

ing marginal contracts, or what is known as guaranteed profit sales. For the information of the Court, it may here be stated that the term "marginal contract" is generally used to indicate the contract between the refiner and the jobber, and the term "guaranteed profits contract" is a term used to indicate the contract between the jobber and the dealer,—by word "dealer" being meant the person who sells at retail. These marginal contracts, so far as respondent is informed, generally provide for a price to be fixed as of the time and place of delivery. It may be true, and probably is, that a number of these marginal contracts have been made by other companies engaged in the petroleum business in competition with respondent, in which the tank wagon price of this respondent has been taken as a standard or basis but that was for the convenience, and at the choice of the parties to such contracts, and this respondent had nothing whatever to do with it.

In so far as this paragraph XIII indicates that there are three prices, to-wit, the wholesale price to the jobber called the "tank-car price," the jobber's price to the dealer, which is known as the "tank wagon" price, and the dealer's price to the consumer, which is known as the "service station price," the bill is about correct.

Respondent particularly denies the last section of paragraph XIII of the bill in which it is averred that the defendants hereto other than respondent, and other refiners are colluding with, or aiding or helping, this respondent in any attempt to fix prices. As heretofore stated, and as will be hereinafter repeated, this respondent has never undertaken to fix the price of any petroleum products, except the price at which it sells to its own customers.

Whether the prices heretofore prevailing have been such as to enable independent dealers to carry on their business, is a matter as to which this respondent is not advised, except that it is advised that that is an immaterial matter.

XIV.

With respect to this paragraph respondent neither denies nor affirms the charges therein made.

XV.

With respect to this paragraph, in so far as it charges that all of the defendants hereto are not only refiners and doing business of refining and selling in tank car lots, but have also entered the field as jobbers, and that this respondent, the Pan-American Petroleum & Transport Company, The Gulf Refining Company of Louisiana, and the

Producers Refining Corporation of Tennessee have begun operating service stations and selling at retail, respondent says that this is probably true, within the limitations hereinafter more fully set out. However, this respondent does not desire to bind its co-defendants, and leaves it to them to make their own answer in this respect.

Respondent, however, denies emphatically that this respondent has engaged in any effort to lessen or destroy competition in Tennessee, of any kind, and it has not undertaken to destroy competition that comes from the independent local dealers throughout the State.

Respondent particularly denies that it is engaged in the "unlawful combinations and agreements hereinafter set out," either in the particulars thereinafter set out in the bill, or otherwise.

Respondent here reiterates that it is not in any combination with the Standard Oil Company of Kentucky, or any other corporation, to keep out competition in Tennessee, and denies that it has been a party to any arrangement whereby there has been allotted and divided among any companies, or set of companies, the territory in the United States.

In so far as said paragraph charges that this respondent has recently combined with its general manager in the City of Memphis, and its local managers in certain other cities, as a result of which combination there has been abolished the differential alleged heretofore to have been maintained, respondent denies again, all and singular, the charges and suggestions that it is engaged, or attempting to engage, in any effort to fix the prices of gasoline, other than the prices of its own products, to its own customers.

In this connection, respondent would further say that there has long existed the practice of selling to a class known as commercial consumers at what are called tank wagon prices, and under this practice, respondent sends its tank wagon to the place of business of the commercial consumer, and places in his tank as much gasoline as the consumer desires to purchase at the tank wagon price. To this practice no objection was ever heard from any source. Recently, however, for business considerations which appeared to respondent to be sound, respondent has indicated to its commercial consumers its willingness to sell gasoline to them at, and make delivery through, its service stations, when they come to respondent's service stations and apply therefor at tank wagon prices. Respondent then believed, and now believes, and avers, that such change in practice was merely a change in the method of delivery, and was justified by business principles of long recognition and

admitted soundness. In order that said practice might be protected from abuse, respondent has invariably required that such commercial consumer who purchases through a service station should not pay for his purchase in cash, but the amount of said purchase should be charged to the commercial consumer and a ticket issued showing the person at whose instance the purchase was made. Monthly bills were accordingly rendered to the commercial consumer reflecting such purchases. Respondent is advised and believes that, in so doing it was acting entirely within its rights, and was pursuing correct business principles.

With the view to further protecting this change of practice from abuse, all of respondent's officers and employes have been instructed to confine this tank wagon price at service stations to legitimate commercial consumers.

Respondent would further point out that it has been a usage of trade from time immemorial to sell to quantity consumers at lower rates than to small consumers, and its granting the tank wagon rate to commercial consumers was but an application of that usage.

However, respondent does not mean by thus defending its course, in selling to commercial consumers at tank wagon prices at service stations prices, to concede that it is bound to limit its tank wagon prices to commercial consumers. On the contrary, respondent is advised and believes that it is entitled to sell its products at any price it sees fit, so long as it violates no law of the State or Federal Government.

XVI.

With respect to the allegations of this paragraph, respondent is advised and believes that they are of no pertinence in this cause. However, respondent denies the allegations of this paragraph, and calls for strict proof thereof.

XVII.

In respect to this paragraph, which makes a charge against respondent's co-defendant, the Gulf Refining Company of Louisiana, respondent makes no answer, but leaves the Gulf Refining Company of Louisiana to speak for itself. However, respondent again denies the suggestion in this paragraph that it is in collusion with said Gulf Refining Company. On the contrary, it is in open and active competition with said company.

XVIII.

This paragraph also refers to the Gulf Refining Company of Louisiana, and respondent leaves it to that company to make its own answer.

XIX.

This paragraph refers to the Sinclair Oil Company, and this respondent leaves to that company what answer shall be made. However, respondent particularly denies that the Sinclair Oil Company is aiding or abetting it in any respect whatever, and again avers that it has no relation or understanding with said Sinclair Oil Company of any kind, but on the contrary, is in active and open competition with it. Respondent does not own or in any way control, directly or indirectly, said Sinclair Oil Company.

XX.

This paragraph refers to the Texas Company of the U. S. A., which will speak for itself. However, respondent denies again that it is in any way related to said Texas Company, or that it is in collusion or combination with it for any purpose whatever, and respondent particularly denies that it is collaborating or acting with the Texas Company in any respect with a view to destroying competition in Tennessee or elsewhere.

XXI.

This paragraph refers to the Pan-American Petroleum & Transport Company, and that company will answer for itself, but respondent emphatically denies that said company is acting in combination with it, and especially denies that it is a subsidiary of respondent.

Respondent does not know the extent to which the Pan-American Petroleum & Transport Company is engaged in business in Tennessee, but is advised and believes that it does not do business in Tennessee. There is, however, a corporation known as the Pan-American Company, or a company having some similar name, with which this respondent has no connection whatever, but it is operating in Tennessee in keen and active competition with this respondent.

XXII.

This paragraph refers to the Producers & Refiners Corporation of Tennessee, which will answer for itself. Respondent denies that it is a subsidiary of respondent, and particularly denies the charge of the bill that said company is operating in this State "only for the purpose of aiding the Standard Oil Company to carry out the unlawful combinations herein set out."

XXIII.

This paragraph undertakes to say that "The purpose and effect of the unlawful practices herein set out is not only to destroy competition, but to destroy the business of these complainants and others operating in like manner."

Respondent denies that there are any such unlawful practices as have been averred, and denies any effort on its part to destroy competition. Respondent is advised that it is immaterial to this cause, what has been the history of the Standard Oil Company heretofore, and denies again.

XXIV.

Respondent denies the allegations in this paragraph except the allegation to the effect that the complainants and other independent dealers in Tennessee are operating at a loss. As to what the facts are in this respect, respondent is not advised.

XXV.

With respect to the averments of this pargraph, respondent says that it may be true that differentials between tank car prices, tank wagon prices, and service station prices, have existed. Exactly the same condition exists in every other line of trade, the wholesaler selling at one price, the jobber at another, and the retailer at a third; but so far as respondent is advised, there has never been any law, either of morals or by statute, or otherwise, which prohibits the owner of the product from selling it at any price that he may see fit, provided he violates no law of the State or Federal Government, and, as heretofore stated, respondent has never engaged in the practice of selling on marginal contracts, and to what extent its co-defendants have been engaged in that practice, respondent is not definitely advised, nor is it definitely advised as to whether they have discontinued the practice of selling on marginal contracts. However, as already indicated, respondent is in open and active competition with its co-defendants, and if they have abandoned the practice of selling on marginal contracts, that was something with which respondent had nothing whatever to do, and their abandonment, if such abandonment has occurred, of selling on marginal contract, was wholly without influence or suggestion from this respondent.

Respondent will call attention to the fact, which will be elaborated hereinafter, and it is indicated in this paragraph, that these complainants have an open market in which they may purchase, and that open market is not under the control and dominion, in any respect whatever, directly or indirectly, of this respondent.

It may be here stated as a fact, and it is a fact, that this respondent has rarely sold its petroleum products to these complainants. There may have been a rare instance here and there in which one or more of the complainants have purchased from one of respondent's tank wagons, but complainants have never in any respect been dependent on respondent for their source of supply, and have only purchased from respondent in the rare instances mentioned for the purpose of convenience to themselves in cases of emergency.

XXVI.

Respondent denies the allegations of this paragraph. These allegations have been substantially denied already in this answer. Respondent particularly desires to deny, however, the charge that "by indirection and subterfuge, by granting rebates and other subterfuges" respondent has "undertaken to affect injuriously the business of complainants." Respondent denies that it has, by any unlawful means, whatever, directly or indirectly injured the business of complainant.

XXVII.

With respect to this paragraph, respondent says that it may be true that, as a general rule, differentials have existed between tank car prices, tank wagon prices, and service station prices, over the United States, but it denies that there is any law of trade, or law of the State, or of the nation, which compels the observance of such differentials. On the contrary, it has been a usage of trade of indefinite duration, under which a party having goods for sale may sell them at any price he sees fit, so long as he violates no law of the country.

XXVIII.

This paragraph refers to the Mexican Petroleum Company, of Louisiana, and that Company will answer for itself. Whether it is a subsidiary of the Pan-American Petroleum & Transport Company, respondent, is not advised, but respondent again says that it sustains no relation with said Company, and is in no agreement or combination with it of any sort, but, on the contrary, it is in open and active competition with it in other sections. It does not operate in Tennessee.

XXIX.

And, now having answered in detail, paragraph by paragraph, the averments of the bill, respondent would further say:

As already indicated, respondent was organized as a corporation under the laws of the State of Louisiana sometime prior to the final decree of the Supreme Court of the United States in the case of State of Tennessee vs. Standard Oil Company of Kentucky, that case being the ouster case hereinabove mentioned, and at the time said final decree was rendered, this respondent was actively engaged in the production and distribution of petroleum products. On or about May 11, 1910, it purchased the physical properties in Tennessee of the Standard Oil Company of Kentucky, applied to the State of Tennessee for permission to enter business in Tennessee, and complied with all the laws of the State of Tennessee thereunto requisite. From time on, this respondent has been engaged in Tennessee in the business of selling and distributing petroleum products, and complied with every law of Tennessee applying to it. No objection or protest against its conduct was made by any official of the State of Tennessee, nor from any other source, until this complaint of these complainants, during all of the time mentioned it was operated as a corporate entirely under the control and direction of its officers, and in an open, legitimate and proper way. It has entered into no combination, agreement or understanding with any of its co-defendants, with a view to fixing or controlling the prices of petroleum products in Tennessee, or with a view to obstruction of competition in Tennessee, but, on the contrary, has pursued its own course without consultation, conference, agreement, or understanding with any of its co-defendants, or with any other corporation.

The so-called allotment of territory referred to in the bill as existing among the Companies bearing the name of Standard Oil was not based upon any agreement or understanding among the several companies, but was the natural and inevitable result of the laws of trade. Each of the companies was so situated with respect to the refining plants as to serve its contiguous territory to the best economic advantage, transportation and other marketing factors. It is not a fact that, when the Standard Oil Company of Louisiana entered the State of Tennessee to transact business, there was any arrangement, combination or understanding between it and any other Standard Oil Company under or by which any other Standard Oil Company was not to compete with the Standard Oil Company of Louisiana in the State of Tennessee, or under or by which the territory of the United States was divided among the Standard Oil Companies so as not only to avoid, but to prevent competition among them. It is not a fact that any such arrangement, combination or understanding has been made, or continued,

or has ever been in existence. The relations between these respondents and other Standard Oil Companies, whose stocks were distributed in 1911, pursuant to a decision of the Federal Supreme Court, were finally terminated by such distribution. The several marketing companies were authorized, became, and have remained separate autonomous corporations. This respondent maintains local marketing and distributing facilities in the State of Louisiana, Arkansas and Tennessee. To the extent that the Standard Oil Company of Indiana and the other Standard Oil Companies whose stocks were distributed in 1911, under the Federal decree referred to, do not maintain local marketing facilities in the State of Tennessee, and the other states named, this is not due to any agreement or understanding to which this respondent, or the Standard Oil Company of New Jersey, is a party, but solely to the independent exercise of the business judgment of their several boards of directors. The fact is, that in all branches of the business, other than the distribution of gasoline and kerosene through local sales stations, the Standard Oil Company of New Jersey and this respondent, on the one side, and the former subsidiaries of the Standard Oil Company of New Jersey, on the other, do a wholesale business to all points which freight rates will permit them to reach, and, in so doing, they come into active competition with one another.

It is a fact, furthermore, that the Pan-American Company (the exact name of which, respondent is advised, is Pan-American Petroleum Corporation), which is controlled, as respondent is now advised, by the Standard Oil Company of Indiana, is installing and operating local marketing stations in Tennessee, and is in direct competition with this respondent.

This charge of an illegal division of territory is not a new one, but has been made from time to time ever since 1911. It has been made the subject of exhaustive investigation on several occasions by the Federal Trade Commission, the Federal Department of Justice and the Attorneys General of several States. No proof sustaining the charge has ever been obtained, and it never can be obtained, because no such agreement or understanding, express or implied, ever has existed, or ever will be made—at least, so far as this respondent and the Standard Oil Company of New Jersey are concerned.

Respondent makes no concealment of the fact that all of its capital stock, except certain qualifying shares, are owned and held by the Standard Oil Company of New Jersey, but it avers again that it is operating and has always operated, as an independent corporate entirely under the manage-

ment and control of its own separate officers, and there has been no effort on its part, or on the part of the Standard Oil Company of New Jersey to control or fix prices, or destroy competition.

In this connection, reference may again be made to the charge made in paragraph V of the bill to the effect that proceedings are now pending before the Federal Trade Commission against the Standard Oil Company of New Jersey. The facts in that connection are that this proceeding has been pending for something like three years. Certainly there has been no finding of any sort that the Standard Oil Company of New Jersey or this respondent, has been guilty of any wrong-doing. That proceeding is not a prosecution, in any sense, of the Standard Oil Company of New Jersey, or of this respondent, but is a mere investigation by the Federal Trade Commission.

XXX.

Respondent here further says, in support of its statement that it does not fix, and has not attempted to fix, prices in Tennessee, that it publishes no price list, other than a card at each service station indicating the prevailing price at that station. There are a number of oil trade journals circulated in Tennessee, such as the "Daily Oil News Report," "Oildom," "Platt's Oilgram," which are issued simultaneously from Teuls, Oklahoma, Chicago, Illinois, and Cleveland, Ohio, daily giving the changes in the petroleum markets. There are other similar trade journals issued weekly which deal with prices, the marketing and production conditions and other information of interest to the petroleum industry, but this respondent has no connection whatever, with any of those publications.

In only a limited number of instances has the tank wagon price of respondent been taken as a basis for the price fixed by independent jobbers and refiners, and even in those cases, respondent had nothing whatever to do with the use by such jobbers or refiners of its wagon prices, as a standard. The principal, but not by any means the sole source, of supply for independent jobbers in Tennessee is what is known as the Mid-Continent field, embracing a large number of oil refiners in Oklahoma and North Texas, in which respondent has no interest. The prices charged by these refiners are subject to constant changes, varying not only from day to day, but sometimes during the hours of the same day, and are governed by considerations with which respondent has nothing to do. The prices charged by such refiners to independent jobbers, and the jobbers to the dealers in Ten-

nessee on contracts for future deliveries, and on other contracts, are controlled mainly by the market conditions in the Mid-Continent field above referred to, and by the law of supply and demand.

It may be true that, in some instances, independent jobbers and refiners have taken respondent's tank wagon prices for a basis of their prices on contracts for future deliveries, but in every one of those instances, respondent's tank wagon prices are taken as a basis merely because the independent refiner or jobber chooses to select them, and not because of any relation of respondent to the situation.

Respondent is engaged in the business of selling and distributing petroleum products in Tennessee in keen competition with a number of companies, chief among which may be mentioned the Gulf Refining Company, the Texas Company, the Pan-American Petroleum Corporation (controlled, respondent is advised, by the Standard Oil Company of Indiana), the National Refining Company and others. With none of those Companies does respondent maintain any connection whatever, nor has it nor has it ever had, any understanding or arrangement between it and them.

It is of importance in this connection that respondent indicate the extent to which competition has affected its business in Tennessee, and respondent now avers that, using round numbers, it handled in 1921, sixty-two per cent of the gasoline sold in Tennessee. On the basis of its experience for the past three months, it has handled only thirty-five per cent. This percentage of thirty-five per cent would be much less, but for the fact that respondent operates wagon routes in the rural districts which its competitors have not generally done.

It may be important to call to the Court's attention the fact that the operation of these wagon routes by this respondent means that the farmer and small user in the country has delivery at his door at tank wagon prices, and that the price to him is not raised, notwithstanding there is little or no competition for his trade.

Of the total consumption of gasoline in Tennessee, approximately fifty-five per cent occurs in the four cities of Memphis, Nashville, Knoxville and Chattanooga. In those cities respondent's tank wagon business and service station business is indicated by the following statement:

Exhibit No. 4 to Motion to Dismiss and Answer

STATEMENT SHOWING ESTIMATED DAILY CONSUMPTION OF GASOLINE AND AMOUNT OF BUSINESS HANDLED BY STANDARD OIL COMPANY OF LOUISIANA THROUGH SERVICE STATIONS AND TANK WAGONS AT POINTS SHOWN BELOW, FOR THREE MONTHS' PERIOD ENDING OCTOBER 31ST, 1925

STATION	Estimated Daily Consumption Bbl. 50 gal. each	Average Sales Per day Bbls. 50 gal. each	Pct.
	TANK WAGON SALES		
Memphis	1,500	51	.034
Nashville	1,200	39	.032
Knoxville	1,000	100	.10
Chattanooga	1,000	58	.058
	SERVICE STATION SALES		
Memphis	1,500	220	.146
Nashville	1,200	146	.122
Knoxville	1,000	97	.097
Chattanooga	1,000	97	.097
	TOTAL T. W. AND S. S. SALES		
Memphis	1,500	271	.180
Nashville	1,200	185	.154
Knoxville	1,000	197	.197
Chattanooga	1,000	155	.155

Respondent further says that, in its service stations in Tennessee, it undertakes to render the best service possible, and to furnish the best petroleum products obtainable; that in its tank wagon service it undertakes to do the same. In proportion to the amount of business, it believes it has larger and better facilities for serving the public than any of its competitors.

There are a very large number of corporations and individuals in Tennessee who are engaged in the business of selling gasoline to the public, and the complainants to this suit represent comparatively a small percentage of that number. Complainants do only a small proportion of the business of serving the public from filling stations. There is a very large number of persons who are operating one or more filling stations in Tennessee, who are not parties to this suit.

Respondent is very seriously injured by the enforcement of the temporary injunction issued in this cause. It interferes seriously with respondent's business, and causes great confusion. Respondent maintains a great many places of

business in Tennessee, operating in practically every county in Tennessee, for example, it has in Memphis 40 service stations, 24 in Nashville, and corresponding numbers in Chattanooga and Knoxville. It would readily appear from the amount of business done by respondent as already indicated, that an interference with its price must necessarily cause a large loss each day, to which respondent ought not to be subjected.

CONCLUSION.

And now, having fully answered, respondent again avers that it has not undertaken, by combination with its co-defendants, nor in any other way, to fix or control prices in the State of Tennessee, nor to suppress competition, and that it has in all respects observed to the letter the laws of the State of Tennessee, and of the Federal Government, and has merely endeavored to do business to the full enjoyment of its rights. Wherefore, respondent prays that the temporary injunction heretofore issued in this cause, be dissolved, and that respondent be hence dismissed with all costs in this behalf most unjustly sustained.

Wherefore, etc.

(Signed) H. D. MINOR,
CHAS. N. BURCH,
A. A. MORENO,
Solicitors for Respondent.

STATE OF TENNESSEE, }
COUNTY OF SHELBY. } ss.

C. O. Scholder, Thomas H. Taylor and C. L. Williss, having been duly sworn, make oath and say, that C. O. Scholder is now, and has been for more than six years last past, Vice-President of the Standard Oil Company of Louisiana, in charge of sales, with offices at the head office of said company in New Orleans, Louisiana, and as such is the active head of the sales department; that Thomas H. Taylor is now, and has been for more than ten years last past, sales manager of said company, with offices at the main office of said company in New Orleans, Louisiana; that C. L. Williss is now, and has been since January 1, 1926, manager of said company for Arkansas and Tennessee, and during the preceding year was acting manager for said states, and that for more than ten years preceding that time was assistant manager for said company for said states; that, in the capacities above mentioned, the said affiants have served the said company to the exclusion of all other business, and have been in close and constant touch with its sales business in Tennessee, and necessarily with the matter of prices.

Exhibit No. 4 to Motion to Dismiss and Answer
Exhibit No. 5 to Motion to Dismiss and Answer

Affiants have carefully read the foregoing answer, in preparing which they had an active part, and state that they are familiar with the facts stated in said answer, and that all and singular the statements made in said answer are true in substance and in fact.

(Signed) C. O. SCHOLDER,
THOMAS T. TAYLOR,
C. L. WILLISS.

Subscribed and sworn to before me, this the 8th day of January, 1926.

MORA B. FARRIS,
Clerk and Master.

(Filed January 8, 1926, James R. Jetton, C. & M., by B. S. Oldham, D. C. & M.)

Exhibit No. 5.

CONSUMERS SUPPLY COMPANY ET ALS.
VERSUS
STANDARD OIL COMPANY ET ALS.
} No. 1488-Q.

In the Chancery Court at Murfreesboro, Tenn.

DECREE.

Be it remembered that the above entitled cause came on to be heard on motion of the defendants, Standard Oil Company of Louisiana, and The Gulf Refining Company of Louisiana, to dissolve the injunction herein granted on January 4, 1926, on the bill and answers thereto filed, at Columbia, Tennessee, upon notice to counsel for complainants. After argument by the respective counsel, the cause was taken under advisement, and after a full consideration thereof the Court is of the opinion, and so orders, that said motion is not well taken, and the same is accordingly overruled and denied, and it is ordered that the temporary injunction

heretofore granted in this cause will stand until further orders of this Court.

To all of which the said respective defendants here and now except.

The Clerk and Master will enter this order on his current minutes. Memo. opinion is filed herewith.

Signed at Columbia, Tennessee, this January 25, 1926.

(Signed) THOS. B. LYTLE,
Chancellor.

A true copy attest:
M. B. FARRIS,
Clerk and Master, Maury County, Tennessee.

CONSUMERS SUPPLY COMPANY ET ALS.
VERSUS
STANDARD OIL COMPANY OF LOUISIANA ET ALS. } No. 1488-Q.

In the Chancery Court at Murfreesboro, Tenn.

MEMORANDUM.

The original bill in this cause was filed purposely to prevent the various defendants from continuing and carrying on the unlawful practice in the conduct of their business, as fully set out and described therein.

Upon these allegations, the following fiat was issued by Judge Estill of Chattanooga, Tennessee:

"*To the Clerk and Master at Murfreesboro, Tenn.:*

Upon execution of bond in the sum of Five Thousand ($5,000.00) Dollars, conditioned as required by law, issue the writ of injunction as prayed in the bill, restraining the defendants from selling gasoline in the State of Tennessee, either in tank car lots, tank wagon lots, retail, or otherwise, without (selling at) the reasonable, usual and customary differential as described in the bill between the price of gasoline sold in tank car load lots and tank wagon lots, and that sold in tank

wagon lots and at retail, and from carrying out the combination alleged in the bill by subterfuge, or otherwise, directly or indirectly.

This January 4, 1926, at 9:00 o'clock A.M.

(Signed) FLOYD ESTILL, *Judge*."

On January 8, 1926, the defendant, Standard Oil Company of Louisiana, filed its answer, and on the same date the defendant, The Gulf Refining Company of Louisiana, filed its answer.

On the 6th day of January, 1926, counsel for complainants were given the following notice by wire:

> "On behalf of the Standard Oil Company of Louisiana, will present Chancellor Lytle on Friday morning, January 8, at eleven o'clock, at the Court House, Columbia, Tennessee, motion to dissolve injunction issued by Judge Estill in cause of the Valley Oil Company et al. v. Standard Oil Company et al. Please take notice accordingly."

On the 8th day of January, 1926, at the time designated in said notice, the respective counsel for complainants, and the two defendants, The Standard Oil Company of Louisiana and the Gulf Refining Company of Louisiana, appeared at Columbia, Tennessee, and asked that said injunction be dissolved, on bill and respective answers filed thereto.

In support of the allegations of the bill many affidavits were filed, and in justification of the matters set out in the answers, also many affidavits were filed.

After argument of counsel representing the respective parties the matters involved in the said motion were by the Court taken under advisement.

In order to fully grasp the merits caused by said motion, it becomes necessary to tersely state the real allegations of the bill, upon which they predicate their cause of action, and also the respective contentions of the said defendants, who, together with the other defendants, caused said alleged complaint.

The bill first recites the history of the Standard Oil Company of New Jersey, together with its subsidiaries, and they charge that there is a combination, confederation and trust brought about, organized, and maintained by and through the defendant Standard Oil Company, together with the other defendants, to destroy competition in the sale and merchandise of petroleum products in the State of Tennessee. It is further alleged that the defendants are wholesale dealers in gasoline, with their places of business at the respective places designated, and also operators of service stations through which gasoline is sold directly to the con-

sumer, and that some few months prior to the filing of the bill herein the defendants and complainants were selling gasoline on what is known as, or termed, marginal contracts, and that the moving factor of the defendants (Standard Oil Company) had used this practice in all the states in which it did business until some time in August, 1925, and in this State it and its subsidiaries ceased to do business under this method except wherein the contracts had not expired, and adopted the practice of selling gasoline in the State to the jobber and the consumer at wholesale prices, and that this was done for the purpose of destroying the complainants, who are independent dealers in their business and trade, and thereby accomplishing this, a monopoly was created, the result of which fixed wholesale and retail prices of gasoline in its use in the State of Tennessee, and thereby wholly destroying all competition in this business.

It is further alleged that the moving spirit of the defendants (Standard Oil Company), together with its subsidiaries and confederates, are not only engaged as sellers of gasoline in the State of Tennessee, but are engaged in the business of wholesalers and retailers, and have established service stations at various places alleged and are selling their gasoline to the consumer at the same price that gasoline can be purchased by the wholesaler. It is further alleged that the conduct and the carrying on of the said business of the said defendants is in utter disregard of the Anti-Trust Statute of the State of Tennessee, enacted into a law in 1903, which is as follows:

> "SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, and it is hereby enacted by the authority of the same, that from and after the passage of this act, all arrangements, contracts, agreements, trusts, or combinations between persons or corporations, made with a view to lessen or which tend to lessen full and free competition in the importation or sale of articles imported into this State, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend to advance, reduce, or control the price or the cost to the producer, or the consumer of any such product or article, are hereby declared to be against public policy, unlawful and void."

It is further alleged that the said defendant, Standard Oil Company of Louisiana, which, it is charged, is dominated by the parent corporation, Standard Oil Company of New Jersey, has control of the various other Standard Oil

Companies of other states, and that its subsidiaries, for the purpose of preventing competition from other companies, and especially the complainants named herein, from doing business therein, and especially in the State of Tennessee, have allotted and divided among themselves the territory of the United States, in order to more perfectly carry out their plan and purpose, domination and control of the gasoline business in the United States.

It is further alleged that by reason of said plan of operation in the State of Tennessee, by the defendant companies, the business of the complainants herein is practically destroyed, and they hereby will suffer irreparable loss. To these respective allegations the defendant, Standard Oil Company, seriatim has interposed in its answer a denial, and in its justification of its conduct of its business in the State of Tennessee, and as an excuse therefor, states:

> "In this connection, respondent would further say that there has long existed the practice of selling to a class known as commercial consumers at what are called tank wagon prices, and under this practice respondent sends its tank wagon to the place of business of the commercial consumer, and places in his tank as much gasoline as the consumer desires to purchase at the tank wagon price. To this practice no objection was ever heard from any source. Recently, however, for business considerations which appeared to respondents to be sound, respondent has indicated to its commercial consumers its willingness to sell gasoline to them at, and make delivery through, its service stations, when they come to respondent's service stations and apply therefor at tank wagon prices. Respondent then believed, and now believes and avers, that such change in practice was merely a change in the method of delivery and was justified by business principles of long recognition and admitted soundness. In order that said practice might be protected from abuse, respondent has invariably required such commercial consumer who purchases through a service station should not pay for his purchase in cash, but the amount of said purchase should be charged to the commercial consumer, and a ticket issued showing the person at whose instance the purchase was made. Monthly bills were accordingly rendered to the commercial consumer, reflecting such purchases. Respondent is advised and believes that, in so doing, it was acting entirely within its rights, and was pursuing correct business principles."

It is insisted, "that while it may be true that the practice of differentials did obtain between tank car prices, tank

wagon prices, and service station prices, the same condition of affairs also exists in every other line of trade, the wholesaler sells at one price, the jobber at another, and the retailer at a third, but in so far as respondent is advised there has never been any law, either of morals or by statute, or otherwise, which prohibits the owner of a product from selling it at any price he may see fit, provided he violates no law of the State or Federal Government."

The answer of the Gulf Refining Company of Louisiana to the said allegations of the bill denies that in so far as it is concerned that it is any party to said combination, or agreement, or trust, and states that the wholesale and retail price of gasoline was primarily fixed by conditions of market, quantity of output, freight, and other elements that generally enter into the price of all commodities, and in further explanation of their conduct in carrying on their business in the State of Tennessee, answering, it says:

> "It is true that recently respondent has been selling gasoline through its service stations to purchasers in quantity at tank wagon prices on charge account. Other companies had been engaged in this practice for some time, and as respondent is advised, some of the complainants have been engaged in this practice. It was a condition of the trade in Tennessee that had to be met by respondent if it was to hold its custom, and it was a practice that, so far as respondent could see, was legitimate and necessary in order to meet competition and to serve its trade on equal basis with other companies."

Suffice it to say that for the purpose of disposing of said motion to dissolve said injunction, the various issues set forth will anwer. Under the various authorities having to do with the complaints of similar, or like kind, it is manifest that where in any case it is shown there is a tendency to prevent legitimate competition whether this exists in raising the price of a commodity or lowering the price of a commodity, such conduct tends to accomplish this result, and under the common law, as well as by statute, such practice is prohibited.

And it is of no effect whether this practice lowers or raises the price of the product to the consumer, the essence of the holdings being to ascertain the intention of those carrying on such practice, and when found in the complaints arising in the various causes, that such was the intention and the purpose of those bringing about such practice, then the courts of the country will declare such illegal and contrary to the welfare of any commonwealth.

In the instant case it is manifest from the allegations of the bill and the answers thereto, in so far as the defendants,

Standard Oil Company and the Gulf Refining Company, are concerned, that there has obtained in Tennessee, prior to August, 1925, a practice whereby refineries sold to the jobber at a certain price, presumably making a profit on his product, and the jobber to the retailer, presumably making a profit and the retailer to the consumer, presumably making a profit on said product, and, as stated, this obtained until the practice was changed, so that now in the sale of petroleum products in the State of Tennessee, the consumer obtains the product at the exact price that the refineries originally sold said product to the jobber, and, of course, under this practice (the price remaining the same), the consumer now must necessarily secure his gasoline at a lower price than he formerly secured same, and it is further patent that if the original seller, under the old practice obtaining prior to August, 1925, is still doing business in the State of Tennessee, now secures for the same product, the same price formerly secured, and if, as alleged, these defendants were doing business in Tennessee under said practice, obtaining prior to August, 1925, and since then has inaugurated the practice alleged, as jobbers and service station operators, there is necessarily incurred the cost and expense in the operation of tank wagons, and salaries of employes, and the expenses incident thereto. Of course, that detracts from their original price in their sales, under the practice obtaining prior to August, 1925, and if they were heretofore in their sale of gasoline to the jobber making a legitimate profit on their product, it must necessarily follow that they are now getting a much less profit by reason of their recent practice inaugurated in the State of Tennessee, whereby the consumer obtains his gasoline at the same price that the wholesalers or jobbers can obtain it.

This, of course, would not only have a tendency to wholly destroy competition, but would in fact destroy competition, and in so far as complainants are concerned, it would be a physical impossibility to operate at all except at a loss. The purpose of this new plan of operation is in no way explainable, except in the respective answers referred to of these defendants and subsidiaries who have fallen into the use of such plan, the practice comes wholly within the allegations of the bill in such combination, either expressly or impliedly, and, therefore, such practices are in utter disregard, and positively destructive of the rights of these complainants.

So it must be concluded that the allegations of the bill, if sustained, will make out a case warranting the temporary injunction in this cause, measured by the many cases of the various states in the Union, together with those of our own

Court. It is apparent to all that each case must stand on its own peculiar surroundings, and no other, and upon a full investigation on the merits. It is contended that the practice obtaining destroys, or tends to destroy, competition; with said practice obtaining not only has the Anti-Trust laws been abrogated, but the common law on the same question has also been abrogated.

Considering the resultant damage or injury that may follow the dissolution of said injunction, or its preservation, it is obvious that complainants cannot do business in the State of Tennessee with the injunction dissolved, except at a loss; it is equally obvious that defendants can continue in business with the injunction remaining without a loss, save that of its customers, and, therefore, while a *prima facie* cause is made out by the bill, it is well always for the Court to look to the resultant injury or damage that follows by reason of the injunction, or its dissolution. So it will thus be seen that to permit said injunction to stand until this cause can be heard upon its merits, there can be no loss to the defendants (except possibly some of its customers), and the legitimate property rights of the complainants will be preserved.

Realizing the many ramifications that will necessarily follow a charge of this kind, the Court is fully cognizant of the many circumstances and facts that must be proven in order to establish such allegations, and, of course, the wide field in which the defendants are operating necessitates considerable time in bringing the cause to a trial on its merits. However, the Court must at all times endeavor to look to and care for the respective rights of its litigants brought before it for an adjudication of their respective differences.

There is no necessity for a full citation of authorities upon which this opinion is predicated, but in order that respective counsel may have access thereto, you are here referred to the following:

Standard Oil Co. v. *Missouri*, 224 U. S., 751; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S., 86; *Standard Oil Co. et al.* v. *State ex rel.*, 107 Miss., 227; *Standard Oil Co.* v. *United States*, 221 U. S., 1; *Standard Oil Co.* v. *States*, 117 Tenn., 618; *United States* v. *American Tobacco Co.*, 221 U. S., 106; *Nash.* v. *U. S.*, 259 U. S., 373; *American Column & Lumber Co.* v. *United States*, 257 U. S., 377; *Live Poultry Dealers Ass'n.* v. *United States*, 4 Fed. Reps., 84-G; *Federal Trade Commission* v. *Beechnut Packing Co.*, 257 U. S., 441; *Dry Myers Medicine Co.* v. *John D. Parks Bros. Co.*, 220 U. S., 373; *State ex rel.* v. *Standard Oil Co.*, 15 L. R. A., 145; *Richardson* v. *Bughl*, 77 Mich., 632; *Darcey* v. *Allein*, 11 Coke, 84-B; *G. N. C. Marion C.* v. *Ceafield Co.*, 190 Fed.

Rep., 927; 32 C. J., 490-91; Fletcher on Corporations, 4309; *Railway* v. *Alms*, 136 S. W., 1164; *Railway* v. *Hale*, 153 S. W., 411; *Dillard* v. *Richardson*, 141 Tenn., 290; *Madison* v. *Stahlman*, 130 Tenn., 403; *Westinghouse* v. *Allys-Chalmers Co.*, 176 Fed. Rep., 362; *Railway* v. *Association*, 247 U. S., 490.

It results that the motion of the respective defendants must be overruled, and in accordance with this opinion a decree has been this day drawn, and ordered filed at Murfreesboro, Tennessee.

(Signed) THOS. B. LYTLE, *Chancellor.*

A true copy attest:
M. B. FARRISS,
Clerk and Master, Maury County, Tennessee.

ORDER SUBSTITUTING TEXAS CO., A DELAWARE CORPORATION, FOR TEXAS CO., A TEXAS CORPORATION.

(Entered September 2, 1927. Gore, Judge.)

In this cause now pending in the United States District Court for the Middle District of Tennessee, Nashville Division, the following has been made to appear to the Court by stipulation of counsel for the respective parties, evidenced by their signatures hereto:

1. The Texas Company, the Plaintiff in this cause, a corporation organized and existing under the laws of the State of Texas, has, since this suit was instituted, sold all its properties, including its properties in the State of Tennessee, to The Texas Company, a corporation organized and existing under the laws of the State of Delaware; and this latter company, The Texas Company of Delaware, has taken over in the State of Tennessee, all of the properties and business formerly owned and conducted by The Texas Company, organized under the laws of the State of Delaware, is now en-

gaged in the sale and distribution of gasoline throughout the State of Tennessee in the same manner, at the same places, and for the same purposes as was its predecessor, the Texas Corporation, at the time of the acquisition of the properties and assets of said Texas corporation, by the said The Texas Company, the Delaware corporation.

And The Texas Company, the Delaware corporation, is engaged in the business of selling gasoline in the State of Tennessee, as well as oil, in interstate commerce, and the sale of gasoline and oil in tank lots, and at the present time is engaged in the sale of gasoline in tank wagons from its established stations and depositories throughout the State of Tennessee to retail dealers, in the same manner as its predecessor, the Texas corporation, the Plaintiff in this original suit.

2. The said, The Texas Company, organized and existing under the laws of the State of Delaware, has qualified under the laws of the State of Tennessee, to do business in Tennessee, and has fully complied with the Statutes and provisions of the State of Tennessee in reference to foreign corporations doing business in this State.

3. The said, The Texas Company, the Delaware corporation, has prepared and was ready to file a supplemental bill in this cause, setting forth the matters and facts hereinabove stated, as well as other appropriate allegations, and asking to come into this cause as a party plaintiff, and be substituted in the place and stead of The Texas Company, the Texas corporation, the present Plaintiff.

4. And the parties in interest being advised that the same results could be obtained by an order or decree entered in this cause by consent and agreement of all parties interested, substituting the said, The Texas Company, the Delaware corporation, as party plaintiff instead of The Texas Company, the Texas corporation, the original plaintiff; and that the cause thereafter proceed as though said supplemental bill had been allowed to be filed under proper allegations made therein.

It is accordingly agreed by the parties, and ordered by the Court that the said Texas Company, the Delaware corporation, be and is, allowed to become a party plaintiff herein, and substituted in the place and stead of the original Plaintiff, the Texas corporation; and that the cause stand and proceed in all respects the same as though The Texas Company, the Delaware corporation had, by supplemental bill and proper proceedings pursuant thereto, been made the party plaintiff, and substituted in the place and stead of the original Plaintiff, the Texas corporation.

5. It is therefore ordered, adjudged and decreed by the

Court that The Texas Company, the Delaware corporation, be and is hereby substituted as the party plaintiff in this cause instead of the original plaintiff, the Texas corporation. That the said substituted Plaintiff, be, and is hereby entitled to the benefit of all proceedings heretofore had in the cause, including the right to the preliminary injunction, ordered to be issued under Decree or Order of the Honorable Charles B. Moorman, Circuit Judge, Xenephon Hicks and John J. Gore, District Judges, sitting pursuant to Section 266 of the Judicial Code.

6. It appearing to the Court that the injunction has not been actually issued, the Order of Decree therefor by the said three Judges not having been actually entered, it is ordered and decreed by this court that the said injunction shall, when issued, be in favor of The Texas Company, the Delaware corporation, and substituted Plaintiff, and the bond required for injunction shall be executed by and in the name of this substituted Plaintiff, The Texas Company, the Delaware corporation.

7. This Decree or Order is agreed to by the respective parties, and ordered by the Court, and approved for entry to the end that the expense and delay incident to a proceeding by way of a supplemental bill might be saved, and the cause shall stand and proceed as though the matters herein embraced had been made by supplemental bill properly filed and regular proceedings had thereunder.

This 29th day of August, 1927.

THE TEXAS COMPANY,
BY JNO. B. KEEBLE, *Attorney.*

Approved for entry.

GORE, *Judge.*

FRANK S. HALL;
Commissioner of Finance and Taxation of the State of Tennessee;

L. D. SMITH,
Attorney-General of the State of Tennessee;

R. M. ATKINSON,
District Attorney-General for the State of Tennessee for the Tenth Judicial Circuit, embracing Davidson County;

BY L. D. SMITH, *Attorney-General.*

PER CURIAM OPINION.

(Filed August 20, 1927)

Before Moorman, Circuit Judge, and Hicks and Gore, District Judges.

PER CURIAM: These causes are submitted on motions for temporary injunctions enjoining defendants, who are officers of the State of Tennessee, from enforcing an act of the Tennessee Legislature of April 8, 1927, which undertakes to regulate the prices at which gasoline shall be sold in the state. The jurisdiction of the court as such rests upon constitutional grounds as well as diversity of citizenship with the requisite amount involved. The equity jurisdiction of the court is involved on the ground of threatened and oppressive prosecutions.

The act establishes a bureau under the Department of Finance and Taxation to be known as the Division of Motors and Motor Fuels in charge of a superintendent, who is charged with the duty of collecting data pertaining to the cost and sale prices of dealers in gasoline. It is made unlawful for any person to engage in selling gasoline in intrastate commerce in Tennessee without first obtaining a permit from the superintendent of the Division of Motors and Motor Fuels. A dealer is required to make application to the superintendent for a permit and to state whether he proposes to sell at wholesale or retail or both, the number and location of his places of business, the prices at which he is selling gasoline at such locations, the cost price of the gasoline to him, including the refinery cost, transportation cost, taxes, inspection fees and all other costs incident to its sale and distribution, the prices at which he proposes to sell, and such other information as the superintendent may require. It is the duty of the superintendent to issue the permit if in his opinion it is "in the interest of the public" and the prices at which the applicant proposes to sell do not exceed a reasonable profit, considering the proper differential between the wholesale and retail prices. If, however, the superintendent does not approve of the prices which the applicant proposes to charge, it is his duty to fix a price at which the gasoline "may be sold," and if the latter is dissatisfied, he may have the action of the superintendent reviewed by the Commissioner of Finance and Taxation, and if still dissatisfied, the Commissioner's action may be reviewed in the courts.

It is further provided in the act that it shall be unlawful for any person to engage in selling gasoline in Tennessee, either at wholesale or retail, or to change the prices at which he is selling gasoline, without the consent of the

superintendent. It is also made unlawful to grant any rebate to any customer or purchaser of gasoline, or to grant any concession or gratuity, directly or indirectly, to any purchaser or customer, or to discriminate against or in favor of any customer or purchaser "by selling at a different price to said purchasers in different localities in Tennessee or to different purchasers in the same locality, except in so far as the freight rates affect the price." The Attorney General, with his assistants, is made the law officer of the Division of Motors and Motor Fuels and is charged with the duty of representing the public before the superintendent in respect to the price or prices the dealer may charge, and also of enforcing the provisions of the act.

The act is assailed as violating the Fourteenth Amendment of the Constitution of the United States in that it deprives the dealer of his property without due process of law, and denies to him the equal protection of the laws. It is also attacked on the ground that it violates Section 8, Article 1, of the Constitution of Tennessee, which contains guaranties similar to those of the Fourteenth Amendment, and because it undertakes to confer upon the Chancery Courts of the state administrative or legislative powers in violation of Section 1 and 2 of Article 2 of the Constitution of the state, which provide that no person or persons belonging to one of the three separate and distinct departments into which the government of the state is divided shall exercise any power properly belonging to either of the others.

Preliminarily to the constitutional questions argued it is contended for the state that complainants are not in position to invoke relief from a court of equity because no property rights belonging to them have been affected by the act or can be affected by it until a price has been fixed at which they must sell gasoline. It suffices, we think, to say in response to this that the act makes it unlawful to sell gasoline without having obtained a permit so to do from the superintendent of the Division of Motors and Motor Fuels, that it became effective from and after its passage, and that every sale of gasoline thereafter, made by a dealer is under the terms of the act unlawful and is punishable under Section 6437 Shannon's Code as a misdemeanor. It is alleged in the bills as amended that the defendants are preparing to and will prosecute complainants for each violation of the act, and indeed it is the duty of the Attorney General and his assistants, as well as the other prosecuting officers of the state, to prosecute any infractions of the law. Clearly, therefore, a continuation of the business of complainants would result in oppressive prosecutions which a court of equity may enjoin if the act shall be determined in-

valid. *Terrance* v. *Thompson*, 263 U. S., 197, and authorities there cited.

The act without doubt confers upon the superintendent of the Division of Motors and Motor Fuels the right and power to fix the prices at which gasoline shall be sold in the state. In this respect it has the effect of depriving both the seller and purchaser of the freedom of contract, a right which has uniformly been held to be within the protection of the Fourteenth Amendment, subject, of course, to the legitimate exercise of the police power of the state. *Allgeyer* v. *Louisiana*, 165 U. S., 578; *Lochner* v. *New York*, 198 U. S., 45; *Adair* v. *United States*, 208 U. S., 161; *Atkins* v. *Children's Hospital*, 261 U. S., 525. The state contends that the act was passed in the proper exercise of its police power, and that in addition to the presumptions in favor of validity, the Court should consider the judicial history of the gasoline industry in Tennessee which the General Assembly had before it and upon which it is presumed to have decided that the legislation was a proper police regulation. After reciting preambulatorily that gasoline is now in general use in the state as a motor fuel for both public and private transportation, is necessary to the carrying on the commerce of the state, and that the business of selling and marketing gasoline has become demoralized because of attempts to destroy competition and because of unfair and improper practices in the trade, the act declares that "the sale and marketing of gasoline in this state is impressed with public use," and then proceeds, as we have indicated, to establish a bureau which is authorized to fix the wholesale and retail prices at which it may be sold.

We do not find it necessary to determine the constitutionality of the act in respect to the several details that are argued, or in connection with the attempt, as claimed by complainants, to vest in the courts legislative or administrative powers, but proceed to consider its effect as a price-fixing measure under the Fourteenth Amendment. Most of the cases cited in argument and briefs were discussed in the recent opinion of the Supreme Court in *Tyson* v. *Banton*, decided February 28, 1927, where it was held that a statute of New York regulating the prices at which theater brokers who purchased tickets from theater owners might resell the tickets deprived the broker of his freedom of contract guaranteed by the Fourteenth Amendment. There, as here, the act specifically declared that the subject matter of the legislation was "affected with a public interest," and the Supreme Court, reversing the judgment of the lower court, held that it was not so affected but was a purely private interest, and while undoubtedly evils in connection

with theater ticket prices, as set out in the statute, existed, they could be corrected only by constitutional means and not by the unconstitutional method of regulating or fixing prices. See also *Wolf Co.* v. *Industrial Court*, 262 U. S., 522, and *Creamery Co.* v. *Minnesota*, — U. S., —. In the last-mentioned case the Court, following the Tyson case, held invalid, as impairing the freedom of contract, a state statute making it unlawful to purchase cream at higher prices in one locality than in others, after allowing for differences in cost of transportation.

It is undoubtedly true, as the state contends, that with changing social and economic conditions there have been extensions of detailed public regulation. None of them, in our opinion, approaches the limits of this legislation. *Munn* v. *Illinois*, 94 U. S., 113, was perhaps the first. It involved grain elevators standing at "the gateway of Commerce," taking toll from all who passed, as in a different degree did *Budd* v. *New York*, 143 U. S., 517, and *Brass* v. *North Dakota*, 153 U. S., 391, and they were held to be subject to public regulation because they had come to hold "such a peculiar relation to the public" that government regulation was "superimposed upon them." In the later case of *German Alliance Insurance Co.* v. *Kansas*, 233 U. S., 389, government regulation of insurance companies was sustained because of "considerations peculiar to the insurance business." It is to be remembered, however, that there are expressions in that opinion which the court said in the Tyson case might be regarded as a warning "to be cautious about invoking the decision as a precedent for the determination of cases involving other kinds of business." Furthermore, the business involved in that case and others relied upon by the state were distinguished in their relation to the public interest in *Atkins* v. *Children's Hospital*, 261 U. S., 525, and in the Wolf case, from the private enterprise of dealing in commodities—in fact, it was held in the Tyson case that, in the absence of a controlling emergency, there is no legislative power to fix the price of such commodities as provisions and clothing. It is, of course, true that in *Wilson* v. *New*, 243 U. S., 332, *Block* v. *Hirsh*, 256 U. S., 135, and *Holding Company* v. *Feldman*, 256 U. S., 170, statutes which in effect regulated prices and restricted the freedom of contract were upheld; but they, as the Supreme Court clearly pointed out in the Tyson case, were emergency measures. This act does not purport and, indeed, could not be said to be such a measure; it is nothing but an attempt to fix the price at which one may sell or buy gasoline, a commodity, to be sure, in general use, and concededly necessary to the convenience, comfort and well-being of the

citizens of the state, but not more necessary than many other commodities which are bought and sold within the state.

It is said that the statute may be upheld as a valid method of suppressing monopolies, which is declared to be one of its aims. We cannot concede that a purpose, however beneficient, may be affected by unconstitutional means. There is a statute of the State of Tennessee aimed at the suppression of monopolies, and although it may be, as suggested in argument, that the judicial history of the statute shows its ineffectiveness to correct those evils in the gasoline business, it is nevertheless true, as said in the Tyson case, that "evils are to be suppressed or prevented by legislation which comports with the Constitution and not by such as strikes down those essential rights of property protected by that instrument against undue governmental interference."

While a statute should be considered in the light of the facts in the legislative mind when it was enacted and is entitled to a presumption favoring validity, it is not the less the function of the courts to hold it invalid if it be clearly opposed to the Constitution. *Atkins* v. *General Hospital*, 261 U. S., 525. Saving the alleged monopoly in the gasoline industry, which if it existed would not, as we have seen, justify the legislation, there is no fact or circumstance which could have actuated the Legislature in enacting this statute that might not be found to support an enactment fixing the sale prices of other commodities, quite as indispensable to the comfort and welfare of the people of the state. Such other commodities, as well as gasoline, are assuredly affected in a sense with a public interest; they are, furthermore, exposed in their distribution and sale to the evils which are declared by the act in question to exist in the gasoline business. They are all related quite as intimately with the commerce of the state and likewise with the welfare and comfort of the citizens of the state as gasoline. This statute makes no distinction between those who are seeking to suppress and those who are fostering competition, the wrongdoer and the innocent; it "spreads an all-inclusive net," as said in the Tyson case. If it is upheld, there is no reasonable limit to the power of the state to regulate or fix the prices of such other commodities, and determine what one, whether wrongdoer or not, should receive for what he has to sell and what he should pay for what he must buy—precisely what the Supreme Court has said cannot be done. In our opinion, the legislation violates the Fourteenth Amendment.

It is further argued for the State that even though it be held that the act is invalid in so far as it attempts to con-

fer upon the State the power to fix the prices at which gasoline shall be bought and sold, the purposes of the act are so varied and separable that it may and should be upheld in other particulars. If it may be said that with the price-fixing features of the act stricken therefrom the legislation would have been enacted, the entire act should not be declared invalid. The act itself provides "that if any section or provision of this act shall be held to be invalid, this shall not affect the validity of other sections or provisions thereof." There are thirteen sections in the act, the first of which is in the form of a preamble referred to, the next nine deal in the main with the subject of regulating and fixing the prices of gasoline, Section 11 defines the term gasoline, Section 12 provides, as we have just stated, that if any section of the act shall be held invalid it shall not affect the other sections or provisions thereof, and Section 13 provides only for the effective date of the act. Notwithstanding the legislative declaration, it seems clear to us that the main purpose of the act is to regulate and fix the prices at which gasoline shall be bought and sold, and it is inconceivable that except for that purpose the legislation would have been enacted.

An injunction may issue in each case temporarily enjoining and restraining defendants and each of them from instituting any prosecution under the act against the complainant therein, upon the giving of a bond, conditioned according to law in the sum of $10,000.00.

ORDER GRANTING INTERLOCUTORY INJUNCTION.

(Entered November 21, 1927. Moorman, Hicks and Gore, Judges.)

This cause came on to be regularly heard on April 30, 1927, before Honorable Charles H. Moorman, Circuit Judge, and Honorable John J. Gore, and Honorable Xen Hicks,

District Judges, upon the plaintiff's application for such interlocutory injunction, to enjoin and restrain the defendants from proceeding or in any wise attempting to enforce the Act of the General Assembly of Tennessee passed April 8, 1927, known as Chapter 22, Public Acts of Tennessee for 1927, which was argued by counsel.

The Court being of the opinion that the price fixing features of the Act aforesaid are unconstitutional, and that the other features are so interwoven with the unconstitutional parts of the Act that is could not be said that those parts which would otherwise be valid would have been enacted had not the Act contained the unconstitutional provisions, and that therefore the enforcement of said statute had the effect to take from the plaintiff its liberty or contract in violation of Article 14 of the amendments to the Constitution of the United States, and denies to plaintiff the equal protection of the law; the reasons for this opinion being more fully set forth in the written opinion on file in this cause;

And it appearing to the Court that the Act makes it unlawful to sell gasoline without having a permit to do so from the Superintendent of the Division of Motor and Motor Fuels; that it became effective from and after its passage and that every sale of gasoline thereafter made by a dealer, under the terms of the Act, is unlawful and is punishable under Sec. 5437 of Shannon's Code as a misdemeanor; that it is alleged in the bill that the defendants are preparing to and will prosecute complainant for each violation of the Act, and that it is the duty of the Attorney General and his assistants, as well as other prosecuting officers of the State, to prosecute any infraction of the law, wherefore a continuation of the business of the plaintiff would result in oppressive prosecution which a court of equity may enjoin if the Act shall be determined invalid;

And it further appearing to the Court, by an agreed decree entered in the cause between plaintiff and defendants, that The Texas Company, a corporation organized and existing under the laws of the State of Delaware, since the filing of the original bill in this cause, has succeeded to all the properties and business of The Texas Company, and particularly the properties and business in the State of Tennessee, and that said Company has qualified to do business in the State of Tennessee and is now engaged in such business, and that it is stipulated and agreed that the said Delaware Corporation, The Texas Company, shall be substituted in this suit as party plaintiff in the place and stead of The Texas Corporation, as if it had been named as plaintiff in the original bill;

It is therefore now ordered, adjudged and decreed, that

upon the plaintiff's execution and filing herein an injunction bond in the penal sum of Ten Thousand ($10,000) Dollars, with good and sufficient surety, conditioned as required by law, the defendant, Frank S. Hall, Commissioner of Finance and Taxation of the State of Tennessee, L. D. Smith, Attorney General of the State of Tennessee, and R. M. Atkinson, District Attorney General of said State for the County of Davidson, in their respective official capacities, and each of them, their servants, agents, employes, successors and subordinates in office and attorneys, and those in active concert or participating with them, and all other persons acting by, through and under them, be and they are hereby enjoined from proceeding to enforce against the plaintiff, The Texas Company, a corporation organized under the laws of the State of Delaware, the Act of the State of Tennessee above mentioned, and from in any way interfering with said plaintiff in the conduct of its said business, upon the ground or for the reasons that said plaintiff has not complied with said act, and from instituting any suit or proceeding against said plaintiff for the enforcement of the penalties and/or forfeitures provided in said act, or for the enforcement against plaintiff of the penalties and/or forfeitures provided by any other law of the State of Tennessee for violation of said act, and that said injunction continue and remain in force until the further orders of this Court in the premises.

To which holding and decree of the Court, the defendant excepts.

Approved:

JNO. B. KEEBLE, *Counsel for Plaintiff.*

L. D. SMITH, *Counsel for Defendants.*

Enter:

CHAS. H. MOORMAN,
GORE,
XEN HICKS,
Judges.

INJUNCTION.

(Issued November 22, 1927.)

The President of the United States of America—To the Marshal of the Middle District of Tennessee, Greeting:

Whereas, in the above entitled cause an application for the issuance of a temporary writ of injunction has been filed and set down for hearing before Honorable Chas. H. Moorman, Circuit Judge, and Honorable John J. Gore and Honorable Xen Hicks, District Judges, on the 30th day of April, 1927. Notice of such application was given to the defendants, Frank S. Hall, Commissioner of Finance and Taxation of the State of Tennessee, L. D. Smith, Attorney General of the State of Tennessee, and R. M. Atkinson, District Attorney General of the said State for the County of Davidson, and the parties, plaintiff and defendants appearing in open court by their solicitors and being heard upon said application and it appearing that cause exists for the granting of writ of temporary injunction pending the final hearing of this cause as prayed for.

It is therefore ordered, adjudged and decreed that said defendants, Frank S. Hall, Commissioner of Finance and Taxation of the State of Tennessee, L. D. Smith, Attorney General of the State of Tennessee, and R. M. Atkinson, District Attorney General of said State for the County of Davidson, in their respective *official* capacities, and each of them, their servants, agents, employes, successors and subordinates in office and attorneys, and those in active concert or participating with them, and all other persons acting by, through and under them, be and they are hereby enjoined from proceeding to enforce against the plaintiff, The Texas Company, a corporation organized under the laws of the State of Delaware, the Act of the State of Tennessee hereafter mentioned, and from in any way interfering with said plaintiff in the conduct of its said business, upon the ground or for the reasons that said plaintiff has not complied with the act of the General Assembly of Tennessee passed April 8, 1927, known as Chapter 22, Public Acts of Tennessee for 1927; and from instituting any suit or proceeding against said plaintiff for the enforcement of the penalties and/or forfeitures provided in said act, or for the enforcement against plaintiff of the penalties and/or forfeitures provided by any other law of the State of Tennessee for violation of said act, and that said injunction continue and remain in force until the further orders of this Court in the premises.

And due return make of how you have executed this writ. Witness the Honorable John J. Gore, Judge of the said Dis-

trict Court, and the seal thereof, at Nashville, this 22nd day of November, A. D. 1927, and in the 152nd year of the Independence of the United States of America.

H. M. DOAK, *Clerk.*

SEAL By S. B. WATSON, *Deputy Clerk.*

Marshal's Return:

Received this writ at Nashville, Tennessee, in Davidson County, November 22, 1927, and executed as herein commanded by leaving copy with R. M. Atkinson, Attorney General, and T. P. Henderson, Special Counsel to the Attorney General for the State of Tennessee, copy with Albert Williams, Commissioner of Finance and Taxation for the State of Tennessee.

This November 28, 1927.

R. Q. LILLARD, *U. S. Marshal.*

By W. B. GOODWIN, *Deputy Marshal.*

ORDER SUBSTITUTING ALBERT S. WILLIAMS, SUCCESSOR OF FRANK S. HALL.

(Entered December 8, 1927. Gore, Judge.)

In this cause came the parties by their respective attorneys and admitted that the defendant, F. S. Hall, sued herein as Commissioner of Finance and Taxation of the State of Tennessee, resigned said office and is no longer connected therewith, and that Albert S. Williams has been duly appointed to said office as successor of said Hall, by the Governor of Tennessee, pursuant to the laws of said State, and is now the Commissioner of Finance and Taxation of the State of Tennessee, and, therefore, it is agreed that complainant's bill be dismissed as to the said F. S. Hall and Albert S. Williams, Commissioner of Finance and Taxation of the State of Tennessee, be substituted as one of the defendants in this cause in the room and stead of the said

F. S. Hall, with all the right to appeal, and such other rights as the defendant, F. S. Hall, had, and subject to the injunctive order of this court and the interlocutory decree entered herein on the 21st day of November, 1927, to the same extent as was the said F. S. Hall, and with full right to appeal therefrom under the practice of this Court.

Enter this 8th day of December, 1927. Gore, Judge.

JOHN B. KEEBLE, *Attorney General.*
L. D. SMITH, *Attorney General.*
J. J. LYNCH.
H. N. LEECH.
CHARLES T. CATES, JR.
Attorneys for Defendants.

PETITION FOR APPEAL.

(Filed December 8, 1927.)

To the Honorable John Gore, District Judge:

The petition of Defendant Albert S. Williams, Commissioner of Finance of the State of Tennessee, L. D. Smith, Attorney General of Tennessee, and R. M. Atkinson, one of the District Attorneys General of Tennessee, filed in your Honor's Court in the above entitled cause.

Your petitioners, Albert S. Williams, Commissioner of Finance of the State of Tennessee, L. D. Smith, Attorney General, and R. M. Atkinson, one of the District Attorneys General of Tennessee, defendants in the above named and entitled cause, feeling aggrieved by the interlocutory order and decree rendered and entered therein on the 21st day of November, 1927, do hereby appeal from said interlocutory order and decree to the Supreme Court of the United States for the reasons set forth in the Assignment of Errors filed herewith and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said interlocutory order or decree was based, duly authenticated, be sent to the Supreme Court of the United States

sitting at Washington under the rules of such Court in such cases made and provided.

And your petitioners hereby tendering proper security for said appeal, further pray that the proper order relating to the security to be required of them, be made, as well as an order allowing said appeal.

ALBERT S. WILLIAMS,
Commissioner of Finance.
L. D. SMITH,
Attorney General.
R. M. ATKINSON,
District Attorney General.
(Signed) By L. D. SMITH,
Attorney General of Tennessee.

L. D. SMITH,
Attorney General of Tennessee.
J. J. LYNCH,
H. N. LEECH,
CHARLES T. CATES, JR.
Attorneys for Defendant.

ASSIGNMENTS OF ERRORS.

(Filed December 8, 1927.)

Now come the defendants in the above entitled cause, to-wit, Albert Williams, Commissioner of Finance and Taxation, of the State of Tennessee, L. D. Smith, Attorney General of the State of Tennessee, and R. M. Atkinson, District Attorney General for the State of Tennessee and for the Tenth Judicial Circuit of Davidson County, Tennessee, and jointly and severally submit and file the following assignment of errors upon which they, and each of them, will rely upon the prosecution of their appeal in the above entitled cause from the decree made by this Honorable Court on the

21st day of November, 1927, granting an interlocutory injunction and restraining order in this case:

I.

That the Court was in error in holding the Act of the General Assembly of Tennessee, challenged and complained of in this cause, to be unconstitutional because said act is a valid and proper exercise of the police power of the State in its declared purpose of preventing monopoly and extortion and protecting intra-state commerce and transportation.

II.

That the Act of the General Assembly of Tennessee complained of and held by the Court to be in violation of the 14th amendment to the Federal Constitution is a proper and valid regulation of the gasoline industry affected with the public interest and which industry is a proper subject of state regulation.

III.

That it is within the just and reserved powers of the State of Tennessee to regulate and fix reasonable prices for the sale and distribution within the state of gasoline—a commodity the sale and distribution of which affects, directly and indirectly, all the people of Tennessee.

IV.

The opinion and holding of the Court to the effect that the entire act was unconstitutional was erroneous even if the price fixing provisions of the act were beyond the power of the state.

It was and is the obvious purpose of the General Assembly to exercise all the power the state had or has in regulating the gasoline industry and remedy the evils recited in the act, and even if that part of the act relating to fixing prices should be held invalid the other provisions of the act separate and distinct therefrom should be sustained and enforced. The Court was therefore in error in failing to sustain all the provisions of the act except the price-fixing provision, even assuming that to be invalid.

V.

The Court was in error in issuing the injunction because the plaintiff had a plain, adequate and complete remedy at law.

Wherefore the appellants pray that the said decree be

reversed and that said District Court for the Middle District of Tennessee be ordered to enter a decree reversing the decision of the lower court in said cause.

L. D. SMITH,
Attorney General.
J. J. LYNCH,
H. N. LEECH,
CHARLES T. CATES, JR.,
Attorneys for Appellants.

ORDER ALLOWING APPEAL.

(Entered December 8, 1927. Gore, Judge.)

On motion of L. D. Smith, Esq., Attorney General of Tennessee, and of Charles T. Cates, Jr., counsel for defendants in the above entitled cause, it is hereby ordered that an appeal by said defendant to the Supreme Court of the United States from the interlocutory order or decree heretofore filed and entered herein, on the 21st day of November, 1927, be and the same is hereby allowed and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of $500.00.

And thereupon said bond with sufficient security was duly approved by the Court.

This 8th day of December, 1927.

GORE, *Judge.*

BOND FOR APPEAL.

(Filed December 8, 1927.)

Know all men by these presents, that we, Albert S. Williams, principal by substitution in the place of Frank S. Hall, also L. D. Smith and R. M. Atkinson, as principals, and Charles T. Cates, Jr., and Roy H. Beeler, as sureties, are held and firmly bound unto The Texas Company in the penal sum of Five Hundred ($500.00) Dollars, conditioned as follows:

Whereas, in the above entitled cause on the Equity Docket of the United States District Court for the Middle District of Tennessee at Nashville, judgment was rendered against the defendants, Frank S. Hall, as Commissioner of Finance and Taxation of the State of Tennessee, L. D. Smith, as Attorney General of said state, and R. M. Atkinson as District Attorney General of Davidson County, Tennessee, and in favor of the plaintiff, The Texas Company, to the effect that the Act of the Legislature of Tennessee attacked in said case was unconstitutional and void; and

Whereas, the defendants in said case have obtained an appeal from the judgment of said Court to the Supreme Court of the United States to review said judgment, and citation has been directed to The Texas Company citing it to be and appear before the Supreme Court of the United States to be holden at Washington, D. C., to show cause why said judgment should not be corrected and reversed.

Now, therefore, the condition of the above obligation is such that if the said appellants shall prosecute their appeal with effect and make their appeal good, or otherwise abide by and perform the final judgment of the Court in the premises then the above obligation shall be void; otherwise the same shall remain in full force and virtue.

ALBERT S. WILLIAMS,
L. D. SMITH,
R. M. ATKINSON,
Principals.
All by ROY H. BEELER,
Assistant Attorney General.

CHARLES T. CATES, by ROY H. BEELER,
ROY H. BEELER,
Sureties

Approved this 8th day of December, 1927.

GORE, *Judge.*

CITATION.

(Filed December 8, 1927.)

To The Texas Company—Greeting:

You are hereby cited and admonished to be and appear at the next session of the Supreme Court of the United States to be holden in the city of Washington, D. C., pursuant to petition for appeal filed in the clerk's office of the District Court of the United States for the Nashville Division of the Middle District of Tennessee, and pursuant to order granting such appeal passed by said District Court of the United States, wherein The Texas Company is plaintiff and F. S. Hall and others are defendants, to show cause, if any there be, why the judgment rendered against the said defendants and mentioned in said petition for appeal should not be corrected and reversed, and why speedy justice should not be done to the plaintiffs in error in that behalf.

Witness the Honorable John J. Gore, United States District Judge for the Middle District of Tennessee, within the Sixth Circuit, this the 8th day of December, 1927, and of the Independence of the United States of America the 152nd.

JOHN J. GORE,
United States District Judge.

We hereby accept service of this citation on behalf of the defendant in error, this 9th day of December, 1927.

JOHN B. KEEBLE,
Attorney for Defendant in Error.

ORDER EXTENDING TIME TO PERFECT APPEAL

(Entered January 5, 1928—HICKS, *Judge*)

In this cause for satisfactory reasons to the court appearing, and by consent of the parties hereto, it is ordered that

the time within which the appellants may file their record on appeal in the Supreme Court of the United States be, and the same is, hereby extended for a period of thirty days from January 7, 1928.

Approved for entry:

XEN HICKS,
United States District Judge.

O.K.
JOHN B. KEEBLE, *Attorney.*
CHARLES T. CATES, JR., *Attorney.*

PRAECIPE.

(Filed December 8, 1927.)

To the Clerk:

You are hereby requested to make transcript of record in this cause, to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in said cause, and to include in said transcript of the record the following, and no other papers or exhibits, to-wit:

1. Caption of the Court.
2. Original Bill with its Exhibits, including affidavits.
3. Retraining order.
4. Motion to dismiss original bill and answer to original bill with all exhibits.
5. Order substituting Texas Co., a Delaware Corp., for Texas Co., a Texas Corporation.
6. *Per curiam* opinion.
7. Order on *per curiam* opinion.
8. Injunction.
9. Order substituting Albert S. Williams successor of Frank S. Hall.
10. Petition for appeal.
11. Assignments of Error.
12. Order allowing appeal.
13. Appeal bond.

14. Citation.
15. Praecipe.
16. Clerk's certificate.

L. D. SMITH,
Attorney General of Tennessee.
J. J. LYNCH,
H. N. LEECH,
CHARLES T. CATES,
Attorneys for Appellants.

Service of the foregoing praecipe accepted.
This 12th day of December, 1927.

JOHN B. KEEBLE,
Attorney for Texas Co.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
MIDDLE DISTRICT OF TENNESSEE.

I, H. M. Doak, Clerk of the District Court of the United States in and for the Middle District of Tennessee, do hereby certify that the foregoing pages contain a true, correct and complete record as called for by the attorneys for the appellant herein in the matter set out in the caption hereto, as the same appears from the records and files in this office.

Witness my hand as clerk and seal of said Court at Nashville, Tennessee, on this the .... day of ....., 1928, and of the Independence of the United States of America the one hundred and fifty-second year.

H. M. DOAK, *Clerk.*

(SEAL)

By .....*D. C.*

SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME TO FILE STATEMENT OF POINTS—
February 23, 1928

On consideration of the motion of Mr. Charles T. Cates, Jr., for an extension of time within which to file a statement of points to be relied upon and designation of parts of the record to be printed,

It is now here ordered by this Court that the said motion be, and the same is hereby, granted, and the time within which to file a statement of points to be relied upon and designation of parts of the record to be printed is extended to and including March 10th, per stipulation of counsel.

IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed March 10, 1928

Come now appellants, complying with Paragraph 9 of Rule 11 of this Court, and submit a statement of the points upon which they intend to rely and also submit and designate the parts of the record by them deemed necessary for the consideration thereof.

Statement of Points to be Relied on

It is insisted by Appellants that the District Court erred in holding invalid the Act of the General Assembly of Tennessee, exhibited with and made a part of the Original Bill in the above entitled cause, being chapter 22 of the Published Acts of the General Assembly of Tennessee for the year 1927, for the reasons following, to-wit:

1. Said Act is a valid, proper and constitutional exercise of the police powers of the State of Tennessee.

2. Said Act is a proper, valid and constitutional regulation of the intrastate gasoline industry, affecting the public interest and use, and that said industry is a proper subject of State regulation.

3. That the gasoline industry is of such importance and so vitally affects the commerce, prosperity and comfort and well-being of the people of Tennessee as to be affected with a public use and has been so managed and operated in the State of Tennessee, as shown by the answer and exhibits thereto, as well as the judicial history of the State and country, that the preservation of the public interest, as well as the commerce of the State, requires the regulation of the said industry and warrants the exercise of the police power of the said State in fixing the price of gasoline in the manner provided in said Act.

4. That, even if the price fixing provisions of said Act should be held to be invalid, nevertheless other separable and distinct provisions of said Act should be sustained and enforced, particularly the provisions relating (*a*) to the publication of prices by gasoline dealers and filing same with the Department of Finance and Taxation; (*b*) the issuance of permits to gasoline dealers; (*c*) prohibiting rebates; (*d*) prohibiting discrimination; (*e*) for the collection and publication of data by the Finance Commission with reference to prices and conditions in the industry; (*f*) providing penalties for violation of the several provisions of the Act thus designated; and (*g*) providing for judicial review of the orders of the Commission.

5. Also for each and all of the reasons set out by and in the five several assignments of error submitted by appellants in the District Court of the United States and set forth on pages 116-118, inclusive, of the printed record from the State Court filed in this Court.

Designation of Record

1. Original Bill and Exhibit thereto, pp. 2-20.
2. Restraining Order, p. 25.
3. Motion to Dismiss Bill and Answer of Appellants, with Exhibits 1, 2, 3, 4 and 5, pp. 26-102.
4. Order substituting The Texas Company, a Delaware Corporation, for The Texas Company, a Texas Corporation, pp. 102-104.
5. Per Curiam Opinion, pp. 105-110.
6. Order granting interlocutory injunction, pp. 110-112.
7. Injunction, pp. 113, 114.

8. Order substituting Albert S. Williams, successor in office to Frank S. Hall, as a party defendant to this cause, pp. 114, 115.
9. Petition for Appeal, pp. 115, 116.
10. Assignment of errors, pp. 116-118.
11. Order allowing Appeal, p. 118.
12. Bond for Appeal, p. 119.
13. Citation, p. 120.
14. Order extending time to perfect appeal and præcipe, pp. 120-122.
15. Clerk's Certificate, p. 122.

NOTE.—The page references are to the printed record as filed in this case by the Clerk of the United States District Court.

This March 3rd, 1928.

L. D. Smith, Attorney General of Tennessee; J. J. Lynch, H. N. Leech, Charles T. Cates, Jr., Attorneys for Appellants.

We, the undersigned, counsel and attorney for Appellee, The Texas Company, hereby acknowledge service and receipt of Statement of Points to be Relied on by Appellants, and their Designation of the Record, as hereinbefore set out.

This March 5, 1928.

Jno. B. Keefer, Attorney for Appellee.

Inasmuch as Appellants have not designated the Affidavits of Amos L. Beatty, R. C. Holmes and W. W. Bruce, found in the printed record on pages 21-24, inclusive, Appellee, The Texas Company, here and now designates said Affidavits in compliance with Rule 11, Paragraph 9 of the Rules of this Court.

This March 5, 1928.

Jno. B. Keefer, Attorney for Appellee.

Office Supreme Court, U.
FILED
SEP 13 1928
CHARLES ELMORE CROP
CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 763 64

ALBERT S. WILLIAMS, Commissioner of Finance of the State of Tennessee, L. D. SMITH, Attorney General of the State of Tennessee, and R. M. ATKINSON, District Attorney General,

APPELLANTS,

Against

STANDARD OIL COMPANY OF LOUISIANA,

APPELLEE.

On Appeal from the District Court of the United States for the Middle District of Tennessee.

Brief and Argument on Behalf of Appellants, Officials of the State of Tennessee.

L. D. SMITH,
Attorney General of Tennessee.

H. N. LEECH,
J. J. LYNCH,
CHAS. T. CATES, JR.,
Attorneys for Appellants.

McQUIDDY PRINTING CO., NASHVILLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 763

ALBERT S. WILLIAMS, Commissioner of Finance of the State of Tennessee, L. D. SMITH, Attorney General of the State of Tennessee, and R. M. ATKINSON, District Attorney General,

APPELLANTS,

Against

STANDARD OIL COMPANY OF LOUISIANA,

APPELLEE.

On Appeal from the District Court of the United States for the Middle District of Tennessee.

Brief and Argument on Behalf of Appellants, Officials of the State of Tennessee.

L. D. SMITH,
Attorney General of Tennessee.

H. N. LEECH,
J. J. LYNCH,
CHAS. T. CATES, JR.,
Attorneys for Appellants.

McQUIDDY PRINTING CO., NASHVILLE

SUBJECT INDEX.

	PAGE
I. TWO VITAL QUESTIONS DECIDED AGAINST THE STATE OF TENNESSEE BY THE DISTRICT COURT	1- 2
1. That the State of Tennessee is without power to regulate the price of gasoline sold within her borders, so as to allow dealers in gasoline to exact only reasonable prices therefor	1
2. That the State is without power to require a foreign corporation, as a condition of its doing business within the State, to furnish information in regard to the conduct of its business within the State	2
II. HISTORY OF THE CASE	2-19
1. Price war, rebates and discriminations in the gasoline industry in Tennessee	2- 3
2. Governor's Message to the General Assembly recommending regulatory legislation	3- 4
3. Legislation complained of and held invalid by the District Court	4- 5 63-71
4. Original Injunction Bill filed challenging constitutionality of the Act	5- 6
5. Answer and motion to dismiss the bill	6-15
(1) Motion to dismiss upon the ground that the Act challenged is a valid, constitutional enactment of the State of Tennessee	6- 7
(2) Answer of defendants in the Court below	7-15
(a) The Standard Oil Company of Louisiana, complainant in the original bill, appellee in this Court, is, in effect, the same corporate interest as the Standard Oil Company of Kentucky which was ousted from doing business in the State of Tennessee by decree of Supreme Court of that State, affirmed by this Court	7-11

PAGE

(b) The gasoline industry in Tennessee is affected with, and has been devoted to a public use and, therefore, is subject to the regulatory police power of the State..... 11-15

(c) The gasoline industry in Tennessee is monopolized and controlled by the principal dealers in said State, and is, therefore, subject to the regulatory police power of the State... 11-15

6. Amendment to bill charging that the officials of Tennessee were about to institute prosecutions for each and every violation of said Act 15

7. Amendment to answer of Tennessee officials, denying allegations of amendment to the bill, and stating that it was not the intention of said officials to attempt to enforce said Act until it had been construed and held valid by the Court 15-16

8. Opinion and Decree of the District Court.. 16-17

(1) That because of threatened prosecutions, complainant in the Court below was entitled to an injunction..... 17

(2) That the price-fixing provisions of the Act are invalid..... 17

(3) That the price-fixing provisions constituted the main purpose of the Act, and that therefore the whole Act was void..... 17

(4) And the Court so decreed..... 17

9. Substitution of Commissioner of Finance and Taxation, Williams, successor in office of F. S. Hall, one of the original defendants, and an appeal prayed and granted..... 17-18

III. ASSIGNMENTS OF ERROR..... 18-19

1. The District Court erred in holding that the Act of 1927 challenged by the bill was unconstitutional because said Act is a valid and proper exercise of the police power of the State, in its declared purpose to prevent monopoly and extortion in the prices of gasoline 18

PAGE

2. That the Act is a valid and proper regulation of the gasoline industry in Tennessee, because said industry is affected with a public interest 18

3. That the Act challenged is within the just and reserved police powers of the State to regulate and fix prices for the sale and distribution within the State, of gasoline,—a commodity affected with and devoted to the public interest 18

4. That even if the price-fixing provisions of the Act should be held invalid, the other regulatory provisions of the Act, intended to remedy the evils recited and set forth in the Act, are severable from the body of the Act and should be sustained 18-19

5. No injunction should have been issued because the Oil Companies had a plain, adequate and complete remedy at law.

IV. PROPOSITIONS OF LAW 19-42

1. The Standard Oil Company of Louisiana, in respect of their intra-state business in Tennessee, is, in fact and in law, the same interests represented by the Standard Oil Company of Kentucky, ousted from doing business in said State, and is not lawfully entitled to carry on its business therein or to complain of the Act of 1927 19-20

Cases sustaining said proposition of law 20

2. A foreign corporation is not entitled to carry on its business in any state except by complying with the conditions prescribed by such state 20-22

Cases sustaining said proposition of law 20-22

3. Courts take cognizance of all matters of general knowledge, and may make use of its knowledge of facts with which they have become familiar by a series of preceding cases .. 22-23

Cases sustaining said proposition of law 22-23

PAGE

4. Every presumption and reasonable intendment is in favor of the constitutionality of the Act 23-25

(a) Brown vs. Maryland, 12 Wheat, 436.. 23

(b) Sinking Fund Cases, 99 U. S., 718..... 23

(c) Arizona Copper Co. vs. Hammer, 250 U. S., 400..... 24

(d) Knoxville vs. Knoxville Water Co., 212 U. S., 8..... 24

(e) Adkins vs. Children's Hospital, 261 U. S., 525, 544..... 25

Other cases sustaining said proposition of law 25

5. Upon the facts disclosed in the record the gasoline industry in Tennessee has been devoted to and is clothed with a public interest, and the legislation complained of was enacted in the proper exercise of the police power of the state 25-26

Cases sustaining said proposition of law..... 25-26

V. ARGUMENT IN SUPPORT OF THE FIFTH PROPOSITION OF LAW, SUPRA..... 26-42

1. To what does the police power of the State extend?—It has never been limited by express definition 26-30

(a) Cooley on Constitutional Limitations.. 26

(b) People vs. Budd, 117 N. Y., 1..... 26-27

(c) Tennessee cases supporting the doctrine that the police power extends to the safety, health, morals, comfort, and welfare of the people, and expands to meet new conditions..... 27-28

(d) Federal cases supporting the doctrine above stated 28-30

In Re: Rahrer, 140 U. S., 554..... 28

Wolff vs. Industrial Court, 262 U. S., 522.... 29

German Alliance Insurance Co. vs. Lewis, 233 U. S., 389, 91-410..... 29

PAGE

Rail & River Co. vs. Yappel, 236 U. S., 338... 29

Central Lumber Co. vs. South Dakota, 226 U. S., 157, 161..... 30

2. Facts relied upon showing that the gasoline industry is clothed with a public interest are not denied by appellee, complainant in the Court below 30

3. Summary of facts and conditions showing that the gasoline industry is a monopoly in Tennessee and has been devoted to, and is affected with a public interest..... 30-35

(1) Matters of common knowledge of which this Court takes cognizance..... 30-32

(a) Mennen Co. vs. Federal Trade Commission, Fed. Rep., 774, 778, 779, reviewing illegal practices of corporations, such as the Standard Oil Company and its subsidiaries, in monopolizing and controlling prices..... 31-32

(2) The judicial history of the petroleum industry showing, as portrayed by the decisions of the State and Federal Courts, an unrelenting and unswerving determination on the part of the Standard Oil Companies to monopolize and control the entire industry in this country.... 32-33

(3) Dealers in gasoline in Tennessee have, in fact, a monopoly of that business, and facts supporting this proposition..... 33-34

(4) Ouster from the State under the anti-trust Acts enforced against the Standard Oil Company of Kentucky, did not and does not give relief to the people of Tennessee,—hence the additional reason for controlling prices of gasoline,—giving a fair price to the dealer, and a reasonable and fair price to the seller... 34-35

(a) Report of Manufacturers' Committee of United States Senate to the effect that gasoline is essential to the life of industry and vital to the public,—that it is affected with a public interest and subject to regulations..... 35

PAGE

4. The Tennessee Act challenged by the Standard Oil Company and other Oil Companies in Tennessee is sustained by the decisions of this Court as a valid exercise of the state's police power 36-42

(a) The case of Tyson vs. Banton, 264 U. S., 140, upon which the learned District Court predicated its holding, and the case of Fairmont Creamery Co. vs. Minnesota, 274 U. S., 1, and Ribnik vs. McBride, decided by this Court on May 28, 1928, relied upon by appellee, cited and distinguished from the facts and principle controlling in this case 36-37

(b) The principles announced and enforced in the Munn case (94 U. S., 113), and Wolff case (262 U. S., 522), predicated in a large measure upon the Allnut case (12 East, 527), sustains the Tennessee Act upon the grounds:

(1) The gasoline industry in Tennessee has been carried on and is being carried on in such a manner as makes it of utmost public consequence affecting the community 37-38

(2) Dealers in the gasoline industry without a grant or governmental franchise, have a virtual monopoly of the sale and distribution of gasoline in Tennessee 37-42

5. The Munn case is the guide-post 37-38

(a) Allnut vs. Inglis, 12 East, 527, upon which the Munn case is largely predicated 38-39

(b) The Wolff case,—its classifications of the businesses clothed with a public interest 39-41

(c) The Van Dyke case (244 U. S., 39), following the Munn case, approvingly quotes:

"Property becomes clothed with a public interest when used in a manner

PAGE

to make it of public consequence and to affect the community at large."

6. Proposition of law as follows:

Even if the price-fixing features of the Act complained of are held to be invalid, nevertheless the other regulatory features of the Act are valid, and should be sustained, as insisted, in the fourth assignment of error 42

(1) Opinion of the District Court to the effect that the other regulatory features of the Act fall with the price-fixing provisions 42-43

(2) Argument in support of the fourth assignment of error 43-60

(a) The price-fixing provisions of the Act are but one of the remedies against the evils complained of as set forth in the bill, and it is manifest that the Legislature intended to assert its power to fully regulate the gasoline industry by means and methods in addition to those included within the price-fixing provisions 43

(b) Some of the severable provisions of the Act analyzed, especially those relating to the collection of data and furnishing information 43-60

(c) Application of the principle announced in Standard Oil Company vs. State, 217 U. S., 817, and the anti-trust Act of 1903 to the conditions sought to be remedied by the Challenged Act 44-45

(d) The case of Weller vs. New York, 268 U. S., 319-322, construing the same statute of New York involved in the Tyson case, supra, sustains the severable provisions of the Tennessee Act 45-49

(e) The cases of Hall vs. Geiger, 242 U. S., 538; Caldwell vs. Sioux Falls Co., 242 U. S., 558, and Merrick vs. Halsey, 242

PAGE

U. S., 568, sustaining the Blue Sky Laws of Ohio, South Dakota and Michigan, sustains the principle and doctrine contended for in the Tennessee Act..... 49-51

7. The provisions of the Tennessee Act prohibiting rebating and discrimination are valid, and are sustained by the decisions of this Court 51-59

(1) Section of the Tennessee Act prohibiting rebating and discrimination..... 52

Sustained by the following decisions of this Court:

Standard Oil case, 221 U. S., 1; Missouri Standard Oil case, 224 U. S., 761; Nash vs. United States, 259 U. S., 273,

(2) It was for the offense denounced by said Section of the Tennessee Act that the Standard Oil Company of Kentucky representing the same interest as does appellee, was ousted from Tennessee, as hereinbefore shown,—the decree of ouster being affirmed by this Court... 52

(a) Central Lumber Co. vs. South Dakota, 226 U. S., 157..... 53-55

(b) Fairmont Creamery Co. vs. Montana, 274 U. S., 1-11 analyzed..... 55-56

(c) Crescent Cotton Oil Co. vs. Miss., 257 U. S., 129, analyzed and applied to this case 57-58

(d) Purity Extract Co. vs. Lynch, 226 U. S., 197, analyzed and applied to this case. 58-59

(e) Other severable provisions relating to differentials 60-61

CONCLUSION 61-62

APPENDIX,—Copy of Tennessee Act..... 63-71

INDEX OF CASES CITED.

	PAGE
Adkins vs. Children's Hospital, 261 U. S., 525, 544	25
Ah Sin vs. Wittman, 198 U. S., 500, 504	59
Allnut vs. Inglis, 12 East., 527, 539-42	25, 38
American Sugar Refining Co. vs. Louisiana, 179 U. S., 89	21, 58
Arizona Copper Co. vs. Hammer, 250 U. S., 400 (63 L. Ed. 1058)	24
Austin vs. State, 110 Tenn., 563, 566	22
Baltic Mining Co. vs. Massachusetts, 231 U. S., 68, 83	20, 21, 57
Beal vs. Chase, 31 Mich., 490	20
Black vs. Hirsch, 256 U. S., 135	40
Booth vs. Illinois, 184 U. S., 425	59
Brown vs. Maryland, 12 Wheaton, 436	23
Brass vs. North Dakota, 153 U. S., 391	25
Brass vs. Stoeser, 153 U. S., 391	40
Brazee vs. Michigan, 241 U. S., 240	47
Budd vs. New York, 143 U. S., 517, affirming 117 N. Y., 1	25, 40
Caldwell vs. Sioux Co., 242 U. S., 558	20, 49
Cargill Co. vs. Minnesota, 180 U. S., 452	21, 58
Central Lumber Co. vs. South Dakota, 226 U. S., 157, 161	30, 53
C. B. & Q. R. R. Co. vs. McGuire, 219 U. S., 549 (55 L. Ed., 328)	29, 54
Crescent Oil Co vs. Mississippi, 257 U. S., 129	20, 21, 57
Dayton Coal, Iron, etc. Co. vs. Boston, 183 U. S., 23 (s.c. 103 Tenn., 604)	26, 27
Dillard & Coffin Co. vs. Richmond Oil Co., 140 Tenn., 298	20
Fairmont Creamery Co. vs. Minnesota, 274 U. S., 1	36, 55
Fort Smith Lumber Co. vs. Arkansas, 251 U. S., 532	21, 58
German Alliance Insurance Co. vs. Lewis, 233 U. S., 389-91, 410, 411, 415-17	25, 29, 40
Green vs. Frazier, 253 U. S., 233	25

PAGE

Grenada Lumber Co. vs. Mississippi, 217 U. S., 433, 442 54
Hall vs. Geiger, 242 U. S., 539 ..... 20, 49
Hammond Packing Co. vs. Arkansas, 212 U. S., 332, 343, 344 ..... 21, 57
Hannibal R. R. Co. vs. Husen, 95 U. S., 465..... 27
Honolulu Rapid Transit & Land Co. vs. Hawaii, 211 U. S., 282 24
Horn Silver Mining Co. vs. New York, 143 U. S., 305 20, 57
In re Rahrer, 140 U. S., 554 28
Jamison vs. Independant Natural Gas Co., 127 Indiana, 555 22
Knight vs. U. S. Land Association, 142 U. S., 161... 22
Knoxville Iron Co. vs. Harbison, 183 U. S., 13 (s.c. 103 Tenn., 421) 25, 27
Knoxville vs. Knoxville Water Co., 212 U. S., 8..... 24, 27
Leeper vs. State, 103 Tenn., 500, 532 ..... 26, 27
Lemeiux vs. Young, 211 U. S., 489, 496 55
LePage Co. vs. Russia Cement Co., 51 Fed. Rep., 941 20
Lindsley vs. Natural Carbonic Gas Co., 220 U. S., 61 58
McGaskill vs. U. S., 216 U. S., 516..... 20
McLean vs. Arkansas, 211 U. S., 539 ..... 25, 29
Manufacturing Co. vs. Falls, 90 Tenn., 466..... 25
Mayor of New York vs. Miln, 11 Peters (U. S.), 139 27
Mennen Co. vs. Federal Trade Commission, 288 Fed. Rep., 774, 778, 779 31
Merrick vs. Halsey, 242 U. S., 569 .....20, 49, 55
Middleton vs. Texas Power, etc. Co., 249 U. S., 152.. 25
Mt. Timber Co. vs. Washington, 243 U. S., 219..... 25
Muller vs. Oregon, 208 U. S., 412..... 22, 23
Munn vs. Illinois, 94 U. S., 113-154.....25, 37, 40, 41
Murphy vs. California, 225 U. S., 623..... 59
Nash vs. U. S., 259 U. S., 273 52
New York, ex rel. Silz vs. Hesterburg, 211 U. S., 31 59
Noble State Bank vs. Haskell, 219 U. S., 104..... 40
Oklahoma Gin Co. vs. State, 252 U. S., 339..... 25
Oklahoma Natural Gas Co. vs. Oklahoma, 258 U. S., 234, 237, 239 25
Oklahoma Operating Co. vs. Love, 252 U. S., 331.... 25
Otis vs. Parker, 187 U. S., 606-9 ..... 55, 59

PAGE
People vs. Budd, 117 N. Y., 1 ..... 26, 40
People of N. Y. vs. North River Sugar Refining Co., 121 N. Y., 582, 9 L. R. A., 33 20
Prentis vs. Southern Railroad Co., 211 U. S., 210... 24
Purity Extract Co. vs. Lynch, 226 U. S., 197..... 55, 58
Railroad vs. Byrne, 119 Tenn., 278, 291, 292..... 25
Rail & River Co. vs. Yappel, 236 U. S., 338 ..... 25, 29
Rast vs. Van Denman, 240 U. S., 342-358..... 58
Ribnik vs. McBride (U. S.), decided 5-28-28..... 36
Richardson vs. Young, 122 Tenn., 471, 522-24..... 49
Sallee vs. Dalton, 213 S. W., 762..... 49
Schallenberger vs. Pennsylvania, 171 U. S., 1..... 22
Shmidinger vs. Chicago, 226 U. S., 578, 57 L. Ed., 364 29
Shea vs. Mining Co., 55 Montana, 522 49
Sinking Fund Cases, 99 U. S., 718 23
Smith vs. State, 16 Pickle (100 Tenn.), 505 28
Sparrow vs. Strong, 3 Wallace, 97, 104 22
Spring Valley Water Co. vs. Schettler, 110 U. S., 347 40
Stafford vs. Wallace, 258 U. S., 495..... 25
Standard Oil Co. vs. U. S., 211 U. S., 1..... 32
Standard Oil Co. vs. State, 117 Tenn., 618..... 32
Standard Oil Co. vs. Missouri, 224 U. S., 761..... 32, 52
Standard Oil Co. vs. State, 217 U. S., 817.....32, 34, 44
Standard Oil Co. of N. J. vs. U. S., 221 U. S., 1.... 33, 52
Standard Oil Co. vs. State, 107 Miss., 227 32
State vs. Edwards, 86 Mo., 102 39
State vs. Standard Oil Co., 173 Fed., 177..... 52
State vs. Fairmount Creamery Co., 153 Iowa, 702, 42 L. R. A. (N. S.), 821 54
State vs. Bridgman & R. Co., 117 Minn., 186..... 54
State vs. Drayton, 82 Neb., 254, 23 L. R. A. (N. S.), 1287 54
State, ex rel Young vs. Standard Oil Co., 111 Minn., 85 54
State vs. Trewhitt, 113 Tenn., 561, 572 49
State vs. Wilson, 101 Kansas, 789, 806 49
State vs. Howitt, 107 Kansas, 423 48
State, ex rel. Watson, vs. Standard Oil Co., 49 Ohio, 137, 15 L. R. A., 156 20
State vs. Standard Oil Co., 120 Tenn., 86 .....32, 34, 52

PAGE

State vs. Standard Oil Co., 218 Mo., 1 32
State vs. Standard Oil Co., 49 Ohio State, 137, 15 L. R. A., 145 32
State, ex rel. vs. Brewing Co., 104 Tenn., 715, 740.. 25
Stone vs. Mississippi, 101 U. S., 814..... 27
Terminal Taxicab Co. vs. District of Columbia, 241 U. S., 251, 254 39
Towles & Co. vs. Miles, 131 Tenn., 79 20
Tyson vs. Banton, 264 U. S., 140 .....36, 45, 47
U. S. vs. Teschmaker, 22 Howard, 392 22
Van Dyke vs. Geary, 244 U. S., 39, 47 ..... 40, 41
Waters Pierce Oil Co. vs. Texas, 212 U. S., 86..... 32
Weller vs. New York, 268 U. S., 319, 322..... 45, 47
Williams vs. Fears, 179 U. S., 270, 276 21
Wolff Packing Co. vs. Court of Industrial Relations, 262 U. S., 522, 535, 536, 538-41 .....25, 29, 39, 40, 41, 48
Yeiser vs. Dysart, 267 U. S., 538 20

TEXT BOOKS CITED

Cook on Corporations, 6 Ed., Sec. 709 20
Cooley on Constitutional Limitations, p. 707..... 20
Morowitz on Private Corp., Sec. 227 20

STATUTES CITED

Public Acts of Tennessee for 1903, Ch. 140 44
Public Acts of Tennessee for 1927, Ch. 22 63

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 763

ALBERT S. WILLIAMS, Commissioner of Finance of the State of Tennessee, L. D. SMITH, Attorney General of the State of Tennessee, and R. M. ATKINSON, District Attorney General,

APPELLANTS,

Against

STANDARD OIL COMPANY OF LOUISIANA,

APPELLEE.

On Appeal from the District Court of the United States for the Middle District of Tennessee.

BRIEF ON BEHALF OF APPELLANTS.

May It Please Your Honors:

There are a number of questions made on the record in this case, but the two vitally important to the people of Tennessee for decision by this Honorable Court are:

(1) Whether a state is without power so to regulate the price of gasoline sold by local dealers to her citizens as to allow such dealers to exact only reasonable prices therefor; and

(2) Whether a state is without power to require a foreign corporation, as a condition of its doing business within the state, to furnish information in respect of the conduct of its business and the sale price of its gasoline for the purpose of ascertaining a reasonable price for such gasoline, *and also as tending to disclose whether such dealer is guilty of rebates and discriminations denounced as unlawful and injurious by the state.*

These questions were decided against the State of Tennessee by the Honorable District Court, and, through her proper officials, she has appealed to this Honorable Court for relief.

HISTORY OF THIS CASE.

Prior to 1925, the Standard Oil Company of Louisiana, appellee herein, had been doing business in Tennessee, including the purchase by the public of its gasoline, until it was selling wholesale and retail to the people of Tennessee approximately fifty per cent (50%), or more, of the gasoline used by them.

Other gasoline companies, some independent and some confederated with or allied to appellee, had come to do business in Tennessee.

There was instituted in the latter part of 1925 a "price war" by appellee and the larger companies designed and tending to crush competition by the smaller companies.

This "price war" was carried on by the means and methods usually invoked by appellee to drive out and destroy competition—that is, by rebates, discriminations in prices, the lowering of prices in some localities, resulting in the destruction of competition therein, and raising prices in other localities to offset and recoup the difference in the prices where competition had been destroyed (R., pp. 48, 49, 50), until the people of Tennessee were practically at the mercy of the appellee and those confederated with it.

To have ousted or sought to oust appellee from the state for the violation of the anti-trust law would not have resulted in relief, because, as will be hereinafter referred to, the ousted company would have been immediately succeeded

by another company different in name, but owned by the same interests. All of this was well known to the Governor of Tennessee, who appealed to the appellee and the other larger companies in the interest of the people of Tennessee for a cessation of the practices indulged in to carry on the "price war" and for a reduction in the price of gasoline, which had increased tremendously as the result of the destruction of competition and the means used to accomplish such result.

Some of the larger dealers, finally including the appellee, lowered their prices (R., p. 51), but did not discontinue their practice of price cutting, rebates and concessions to favored customers; whereupon when the General Assembly of Tennessee convened in 1927, *the Governor submitted a message to said General Assembly*, as follows:

> "I recommend proper legislation to control the distribution and price of gasoline. Bills are being carefully prepared to this end. Our people have been victimized long enough in the excessive cost of gasoline. The state regulates the cost and distribution of gas and electricity. It is far more important to regulate the cost and distribution of gasoline. This commodity, to all effects and purposes, is now controlled by a monopoly. There are numerous refineries and many distributors, but a single company in reality makes the market on gasoline. Sometimes there is competition in prices, but that is occasional. We may have a short period of price competition, always succeeded by higher prices. Some state must become a pioneer in this field of regulation. Let Tennessee take the lead; she is the Volunteer State. I recommend that a proper agency be forthwith created, with power and authority to approve or refuse all changes in the price of gasoline and to regulate its cost and distribution, and to make all necessary rules and orders in connection therewith for the protection of the public, and for the protection of all distributors of gasoline, against the machinations and unfair practices of more powerful competitors. Eminent lawyers maintain that the state can exercise these powers; if so, they certainly need to be exercised.

"The people should not be required to submit to the extortion which prevails in Tennessee during recent months. Our people are being plundered without let or hindrance, yet the state was powerless to compel relief. We could only importune it. The Governor suffered under the shame and humiliation of our situation. No company doing business in Tennessee has any right to spurn the just demands of the people. Our present situation is intolerable, and you should attack this problem from every angle and pass bills of any kind on the subject of gasoline control which are lawful and just. Eminent counsel have been employed to prepare this legislation, and while I am the Governor, I intend to contest whatever laws that are passed to the last courts of the country until we have established the power of the state over all companies, big and little, which sell and distribute gasoline in Tennessee, in the interest of reasonable prices and fair competition."

LEGISLATION COMPLAINED OF.

The result of the conditions brought about by appellee herein and its allies was—all known to the people of Tennessee and their representatives—Chapter 22 of the Acts of the General Assembly of Tennessee of 1927, duly passed and approved by the Governor on April 8, 1927, by which the State of Tennessee sought to regulate the sale price of gasoline within her borders by providing agencies for the fixing of reasonable charges and prices therefor, by prohibiting rebates and other discriminations in respect of such charges, and by requiring dealers in gasoline to furnish certain information, in regard to their business, considered necessary or helpful in the fixing of reasonable prices or in discovering and preventing unlawful rebates, combinations, or discriminations in business, enabling such dealers to extort from purchasers unfair, unreasonable, and unequal prices for said commodity devoted to and impressed with a public use.

R., pp. 16-23.

Said Act is found in the Record on pages 16 to 23, inclusive, and for convenience is printed as an appendix to this brief.

The preamble of said Act, as set forth in its first section, is as follows:

> "Whereas, gasoline is now in general use as a motor fuel, in both public and private transportation, and is necessary in carrying on the commerce of the people of this state; and
>
> "Whereas, the business of selling and marketing gasoline has become demoralized because of the attempt on the part of some dealers to monopolize the business and destroy competition, and because of the unfair and improper practices in the trade, it has become necessary for the state to control and regulate the business of selling and marketing gasoline in order to prevent the destruction of competition and to prevent extortionate prices and to preserve both public and private commerce and transportation:
>
> "It is therefore hereby declared that the sale and marketing of gasoline in this state is impressed with public use."

BILL FILED.

On April 9, 1927, the day following the passage of said Act, and before any of its provisions could have been enforced, the appellee, Standard Oil Company of Louisiana, a corporation organized under the laws of Louisiana, as plaintiff, filed its bill in the District Court of the United States for the Middle District of Tennessee, alleging, in substance, among other things, that said Act was void for the alleged reason that it interferes with appellee's freedom to contract, and that, in attempting to fix or control the prices for the sale of appellee's gasoline, offends against the due process clause of the Fourteenth Amendment to the Federal Constitution.

R., pp. 2-15.

The Act is also challenged upon the grounds that it confers legislative authority upon the courts and interferes

with interstate commerce; but inasmuch as the Honorable District Court did not pass upon these questions—certainly did not sustain the appellee's insistence thereon—it is not deemed necessary to further refer thereto.

It is to be noted that there was no charge in the bill to the effect that it was the intention of the state, through the agencies named in the bill, to require appellee to sell its gasoline at an unreasonable price or at a price that would not yield a fair and just return to appellee.

An injunction was prayed (R., pp. 14, 15), inhibiting appellants, officers of the state by and through whom the provisions of said Act is to be administered, from enforcing the terms and provisions thereof.

On the same day—to-wit, April 9, 1927—a restraining order was issued.

R., pp. 23, 24.

ANSWER AND MOTION TO DISMISS BILL.

On April 30, 1927, the appellants, defendants to the original bill, filed their answer (R., pp. 25-54), and incorporated therein (R., pp. 25, 27) a motion to dismiss the bill upon, in substance, the following grounds:

(1) The allegations of the bill showed no grounds for equitable relief.

(2) That to the extent said bill is predicated upon claimed interference with plaintiff's alleged contract rights, plaintiffs wholly failed to aver and set out any contract existing between it and any firm, person, or corporation which would be unlawfully affected by said Act within the meaning of the provisions of the State or Federal Constitutions relied upon in said bill.

(3) That plaintiff is a foreign corporation and is entitled to carry on its intra-state business in Tennessee only under such conditions as said state may deem proper to impose upon it, and said Act passed within the just powers of said state is a valid enactment, prescribing the terms and conditions upon which plaintiff may carry on and operate its intra-state business; and if plaintiff does not desire to comply with said Act, it may withdraw or discontinue such business without incurring any penalty whatsoever.

(4) That said Act is a valid enactment within the sovereign and police powers of said State of Tennessee.

(5) That upon the facts averred in the bill, and other facts of general and common knowledge, of which the court will take notice, gasoline, by the acts and doings of plaintiff, has been devoted to a public use and is affected with a public interest, and is therefore subject to regulation by the State of Tennessee.

(6) That it is within the power of the state to prohibit concessions, rebates, gratuities, and other practices, the necessary result of which is to destroy fair and reasonable competition and bring about unjust discrimination between purchasers and users of gasoline.

(7) That the officers of the state, charged with the enforcement of said Act, have taken no action with the view of determining the regulations or fixing the prices of gasoline, and until such action shall be taken and shown to be unreasonable in the sense of the law, there is no ground of equity jurisdiction; and further that the bill shows that plaintiff has not sought to avail itself of the remedies provided by the bill, fully adequate to protect every right of plaintiff.

(8) That no case is made by the bill showing any violation of the property rights of plaintiff.

(9) The Court must assume that the conditions of marketing and selling of gasoline in Tennessee at the time said Act was passed were and are as denounced in said Act, and before the Court can entertain jurisdiction of this cause the plaintiff must allege in the statement of its grievances facts that it was not engaged in the practices having the effect condemned in said Act, and particularly the first section thereof, which was not done.

ANSWER.

In their answer (R., pp. 27-32), appellants denied the allegation of appellee to the effect that it has been legally qualified, or has been entitled since May, 1910, to do business in Tennessee, and specially pleads that appellee is not so qualified or entitled to do business in said state, but, in fact, is an outlaw and has been enjoined from carrying on or do-

ing business in the State of Tennessee by the judgments of the courts of said state, affirmed by this Court.

The facts averred to sustain said special plea and insistence are in brief as follows:

That during and prior to 1906, the Standard Oil Company of Kentucky—one of the group of Standard Oil corporations—had been doing business in Tennessee, and, along with certain of its representatives and agents, was indicted in 1905 for violating the Tennessee "anti-trust law" in that it had entered into a conspiracy for lessening and destroying free competition in the sale of coal oil in Tennessee, with the result that said corporation and its representatives—co-conspirators—were convicted and fined five thousand dollars ($5,000.00), and one of its representatives was fined $3,000.00; but upon appeal, while the judgment against said representatives was affirmed, it was held by the Supreme Court of Tennessee that the remedy against the offending corporation was not by fine, but by a proceeding to oust it from doing business in the state, with the result that the judgment imposing the fine was reversed. This case is officially reported under the name and style of *Standard Oil Company, et al., vs. The State,* 117 Tennessee, pp. 618 to 679, inclusive.

Thereupon, the State of Tennessee, on the relation of her Attorney General, filed a bill in one of the chancery courts of said state, charging, in substance, that the Standard Oil Company of Kentucky had been guilty of conspiracies and agreements violative of the Tennessee anti-trust law, and seeking a decree cancelling its permit to do business in the state, and that it be ousted and enjoined from further carrying on its intra-state business in Tennessee.

To said bill said corporation made defense, but upon the proof adduced at the trial the Chancery Court granted the relief sought and perpetually enjoined said Standard Oil Company of Kentucky from doing business in Tennessee.

R., pp. 28, 29.

Upon appeal by said corporation from the Chancellor's decree, it was affirmed by the Supreme Court of Tennessee on April 11, 1908, and the opinion of the Court directing

the affirmance of the decree is reported in 120 Tenn., pp. 86 to 178, inclusive.

R., pp. 29, 30, 56, 57.

Said Standard Oil Company sought and secured a writ of error from this Court to the Supreme Court of Tennessee for the purpose of reviewing the decree of the latter Court, and in due course the case came for trial in this Court on or about April 20, 1910; and on May 2, 1910, this Court affirmed the decree of the Supreme Court of Tennessee and that of the Chancellor, hereinbefore referred to.

The opinion of this Court, officially reported, is to be found in 217 U. S., pp. 817, *et seq.*

R., pp. 30, 56-60.

After the Supreme Court of Tennessee had affirmed the decree of the Chancellor, ousting said Standard Oil Company of Kentucky from doing business in Tennessee and enjoining it from doing further intra-state business in said state, and after said Oil Company had secured a writ of error from this Court to said Supreme Court of Tennessee, as hereinbefore shown, appellee herein, plaintiff in the District Court, was granted a charter from the State of Louisiana; but it made no application to the authorities for permission to do business in the State of Tennessee until *May 6*, 1910—*only four days* after this Court had, on May 2, 1910, affirmed the ouster decree against the Standard Oil Company of Kentucky.

R., p. 31.

That both the Standard Oil Company of Kentucky and the Standard Oil Company of Louisiana were and are but dummy corporations, owned, controlled, and dominated by the Standard Oil Company of New Jersey, which latter corporation practically dominates and controls the entire gasoline industry in the United States.

R., pp. 31, 48.

That after the affirmance by this Court of the ouster decree of the Supreme Court of Tennessee, the Standard Oil Company of New Jersey, theretofore doing business in Tennessee through its dummy corporation, Standard Oil Com-

pany of Kentucky, continued to do business in said state by the simple subterfuge of filing with the Secretary of State of Tennessee a copy of the charter of the Standard Oil Company of Louisiana and changing the name in Tennessee from Standard Oil Company of Kentucky to Standard Oil Company of Louisiana.

That there was no change in the management of the business, which was not only dominated and controlled by the same owner—to-wit, Standard Oil Company of New Jersey—but retained the same management in Tennessee, same officials, same employees, using the same property and paraphernalia of trade—except upon the tank wagons, stations, and stationery the name "Kentucky" was stricken out and the name "Louisiana" substituted—so that the corporate or business name appeared to the public as Standard Oil Company of Louisiana.

That the officials of the State of Tennessee did not know at the time the copy of the charter of the Standard Oil Company of Louisiana was filed that it was but a dummy corporation, owned and controlled by the Standard Oil Company of New Jersey, which was also the owner of the Standard Oil Company of Kentucky, which had been ousted from the state, and did not know that the same "managers, agents, servants, and attorneys" of the Standard Oil Company of Kentucky, who had been enjoined from doing business in Tennessee, were continuing to do and carry on the same business under the fraudulent name and guise of the Standard Oil Company of Louisiana, and that the facts in reference to said fraud and subterfuge were but recently discovered.

R., pp. 31, 32.

Therefore it was averred and charged that said Standard Oil Company of Louisiana, being but a dummy corporation of the Standard Oil Company of New Jersey and the reflection of its dummy Standard Oil Company of Kentucky, was fraudulently substituted by the common owner, Standard Oil Company of New Jersey, into the oil business in Tennessee, from which the said Kentucky corporation had been ousted, and that said Standard Oil Company of Louisiana

had never legally and properly complied with the laws of Tennessee, and that it came fraudulently into the State of Tennessee, and is now in contempt of the decree and injunction of the Supreme Court of Tennessee and the Chancery Court of Sumner County.

R., pp. 31, 32.

For the reasons aforesaid appellants denied that the Standard Oil Company of Louisiana is entitled to invoke the jurisdiction of a court of equity upon the grounds set forth in its bill.

FURTHER ANSWER.

In and by said answer special denials are interposed to several paragraphs of plaintiff's bill, and it is insisted that plaintiff and its associates have a virtual monopoly of the gasoline industry in Tennessee; that the sale of gasoline by said companies, amounting to more than 129,000,000 gallons, has been superinduced and brought about by said companies, who have, in fact, devoted gasoline to the public use; and that under the police powers of the state it has the right to regulate the method of dealing and the rates and charges, so as to insure to the purchasers of gasoline a fair price and to the dealer a fair profit; and that it has the right to require the Standard Oil Company of Louisiana to furnish the information referred to in Sections 3 and 4 of said Act (pp. 17, 18), not only to enable the officials of the state, charged with the duty of administering said Act, to ascertain what would be a fair and reasonable price for gasoline, but to enable them to carry into effect and administer the provisions of Section 8 of said Act (R., p. 21), prohibiting gasoline dealers in Tennessee from granting any rebates to, or making discriminations among, its customers.

The answer then (R., pp. 35, 48) gives a history of Standard Oil Companies, as reflected in the decisions of this and other Federal courts and the reports of investigating committees, showing conclusively that said companies, including the Standard Oil Company of Louisiana, have virtually monopolized not only the production of gasoline, but its marketing in the several states and areas which have been par-

celed out among them and their subsidiaries—the State of Tennessee having been allotted to the Standard Oil Company of Louisiana, successor to the Standard Oil Company of Kentucky.

The extent of the business of the Standard Oil Company of Louisiana and the companies dealing in gas confederated with it is set out in the answer as follows:

> "And now, defendants show and aver that the plaintiff herein, and other like companies engaged in the business of refining and marketing gasoline, and having a practical monopoly of the sale of gasoline in the State of Tennessee, have, by their representations as to its widespread useful qualities, particularly for power and motor purposes, so induced the people of Tennessee to the uses of gasoline, particularly for motor and power purposes, that said commodity, by said plaintiff and others allied with it, and dealing therein, has been and is devoted to the public use, and has become and is affected with a public interest, and is subject to reasonable regulations in its use and price by the State of Tennessee.
>
> "Defendants charge that the plaintiff herein, and others, refiners and dealers in combination with it, in the manner and by the practices set forth in Exhibit No. 3 hereto, fixed the price and attempted to control, and do control, directly or indirectly, the price of every gallon of gasoline sold in the State of Tennessee.
>
> "That gasoline has become of such general use as to affect directly or indirectly practically all of the people of Tennessee, is shown by the fact that the sales of gasoline in Tennessee in 1924 amounted to 90,798,244—that such sales were increased in 1925 to 110,411,294 gallons, and in 1926 to 129,358,213 gallons—thus showing an increase over 1924 of, in round numbers, thirty-nine million gallons of gasoline.
>
> "In the State of Tennessee there are in use more than two hundred and eighty thousand motor vehicles, consisting of automobiles, trucks, motorcycles, taxicabs, and busses, to the operation of which gasoline is an

absolute necessity; and in addition to such motor-driven vehicles, there are thousands of farm tractors, stationary gasoline engines, road-making machinery and other kinds of machinery to which the use of gasoline has become necessary and indispensable.

"In said state, the use of gasoline has become, and is necessary, not only to the operation of motor-driven vehicles used in trade and commerce, but to automobiles used by business concerns, and by families for their health, comfort, and convenience.

"By the use of gasoline, bus companies and other common carriers have become important factors in the daily commerce of the state. In practically every county of the state bus lines are used, and these are rapidly taking the place of railroads in local public transportation.

"The General Assembly of the State of Tennessee is now considering legislation upon the subject of bus companies as common carriers. Without the use of gasoline, trade and commerce carried on and operated through the agency of bus companies, automobiles, trucks, and other motor-driven vehicles depend upon the opportunity and ability of the public to secure gasoline at reasonable prices.

"During the year of 1926, the State of Tennessee built and constructed 484 miles of public highway, and now has under contract and under contemplation of construction, additional 1,237 miles of highway. It is necessary in the building, operation, and maintenance of its highways for the state to use, and the state does use, large quantities of gasoline, and the building and maintenance of said highways at reasonable cost and expense depends upon the ability and opportunity of the state to secure gasoline at reasonable prices.

"In practically all of the municipalities of the state maintaining and operating fire departments, the use of gasoline has become and is indispensable for the proper operation of engines and other machinery connected with said departments and devoted to the use and protection of the public.

"In nearly all of the ninety-five counties of the State of Tennessee, the rural schoolhouses serve widespread areas, and experience has shown that many of the children in such areas have been unable to attend the public schools, particularly during the winter months, for lack of means of transportation, with the result that at this time, in more than half of the counties of Tennessee, motor-driven vehicles, operated by gasoline, are being used to carry and transport to such schoolhouses the children of Tennessee in order that they may receive the benefits of at least a primary education.

"Without the use of gasoline for such motor-driven vehicles—which use has been induced by plaintiff and other gasoline refiners and dealers—the school busses and trucks cannot be operated, and the result to the school children of Tennessee would be hurtful beyond calculation if the state fails to secure gasoline at reasonable and fair prices for said busses and trucks. Further, not only is the use of gasoline necessary to commerce and trade within the State of Tennessee, but in its use for private and family automobiles, it contributes largely to the promotion, not only of the convenience and comfort, but of the health of the people of Tennessee, and for such purposes it is essential that gasoline be secured at a fair and reasonable price.

"It carries the bread winners of the family to their work and returns them to the home with the least possible waste of time, and then in the evening and on holidays carries the tired mother and the children to the pure and health-giving air of the country.

"From such uses as have been hereinbefore referred to, and others of which the Court will take cognizance, it is manifest that gasoline and the opportunity to secure the same at reasonable prices have become necessary in practically every department of human activity, having to do, or connected with, the development of the resources of the state with the proper exercise of governmental functions in the building and maintenance of roads and the furnishing of means of reaching and making accessible the public schools of the state—with

intra-state travel and commerce, and with the comfort, health, welfare, and prosperity of the people of the State of Tennessee, with the result that gasoline has become affected with a public interest, and has, in fact, been devoted to the public use, so that its regulation is not only proper, but has become imperative under conditions existing in the State of Tennessee, as hereinbefore set out.

"There is no attempt made by the Act challenged by the plaintiff to take from it any legitimate right. Defendants deny that plaintiff has a constitutional right to destroy competition by granting rebates, or to sell its products at extortionate prices, and these are the things condemned and sought to be prevented by said Act passed under the sovereign police powers of the state."

AMENDMENT TO BILL.

After appellants had filed their answer and motion to dismiss, which brought to the attention of the District Court the utter failure of the Standard Oil Company of Louisiana to aver that its business was about to be interfered with or that procedings were about to be instituted against it by state officials for violating the provisions of said Act, the appellee, on June 6, 1927, filed a motion to be permitted to amend its bill so as to charge that the officers of the State of Tennessee would cause it to be indicted for each and every violation of said Act, and said motion was granted and the original bill so amended.

R., pp. 117, 119, 120.

AMENDMENT TO ANSWER.

Thereupon the officials of the State of Tennessee were permitted to amend their answer so as to specially answer said amendment to said original bill, as follows:

"Defendants in special answer to the amendment to the original bill say:

"The defendants, Frank S. Hall, Commissioner of Finance and Taxation, and L. D. Smith, Attorney General of Tennessee, are by said Act charged with the

duty of enforcing the same in the manner therein prescribed; and if the plaintiff has been advised that these officers of Tennessee, charged with the enforcement of the Act of 1927 challenged in the bill, intend to enforce the Act, these defendants say that the plaintiff has been properly and correctly advised; but if the plaintiff has been informed or advised that it will be indicted for each and every violation by it of said Act, defendants say that such advice or information is wholly erroneous and without any basis in fact, because defendants have no such intention or purpose, and said allegation is denied.

"Further answering, defendants say it is their opinion, and they so aver, that said Act in its Eighth Section provides and prescribes the only penalty which can be enforced against the plaintiff for violation of said Act, to-wit: a refusal to grant the plaintiff a permit, or the cancellation of the permit already granted, and that such penalty so provided in said Act for its enforcement is exclusive.

"Further, defendants say, however, that if the plaintiff should be guilty of such unlawful acts as bring it in conflict with the Anti-Trust Act of Tennessee of 1903, Chapter 140, plaintiff is not even then subject to indictment, but to the Ouster Penalty provided by said Anti-Trust Act, being the Act of 1903, Chapter 140.

"Further, defendants deny that they have any intention or purpose to undertake to enforce said Act of 1927 in any other manner than is prescribed in said Act, and its validity is determined."

R., pp. 118, 122.

OPINION OF COURT.

After its answer had been amended, and also after the answer of appellants had been amended, as hereinbefore shown, the application of plaintiff for injunction came on for hearing before three judges in the District Court, upon the entire record, to-wit: the original bill as amended and exhibits thereto, and the motion of defendants to dismiss and their answer, with exhibits thereto, and their answer

to the amendment to the original bill. And thereupon, on August 20, 1927, the opinion of the Court was filed, holding in substance:

(1) That because of the threatened prosecutions alleged in the amendment to the bill, plaintiff was entitled to an injunction. The Court overlooked or ignored the amendment to the answer specially answering the amendment to the original bill, sworn to by the Attorney General of Tennessee, in effect denying the allegations contained in the amendment to the original bill and denying that defendants had any intention or purpose to enforce said Act in any other manner than as prescribed in said Act (which does not provide for indictment), and until said Act was construed by the courts and its validity determined.

(2) That the price-fixing provisions of the Act of 1927 were in violation of the due process clause to the Fourteenth Amendment to the Federal Constitution.

(3) That, notwithstanding the provisions of Section 12 of the Act—"that if any section or provision of this Act shall be held to be invalid, this shall not affect the validity of other sections or provisions hereof" (R., p. 23)—the price-fixing provision constituted the main purpose of the Act, and that, as it seemed to the District Court, "it is inconceivable that except for that purpose the legislation would have been enacted," and therefore the entire Act was void.

R., pp. 123-128.

A decree was entered in accordance with the opinion of the Court.

R., pp. 129, 130.

After the entry of said decree, F. S. Hall, one of the original defendants, sued as Commissioner of Finance and Taxation of the State of Tennessee, resigned said office and was succeeded by Albert S. Williams; and thereupon, by agreement, plaintiff's bill was dismissed as to the said F. S. Hall, and said Albert S. Williams, as Commissioner of Finance and Taxation of the State of Tennessee, was substituted as one of the defendants to the original bill in the room and stead of the said F. S. Hall.

APPEAL.

Thereupon, defendants in the court below petitioned for and were granted an appeal to this Court.

ASSIGNMENT OF ERRORS.

The assignments of error submitted and filed with the petition for appeal is found in the Record at pages 134 and 135, and is as follows:

"I.

"That the Court was in error in holding the Act of the General Assembly of Tennessee, challenged and complained of in this cause, to be unconstitutional, because said Act is a valid and proper exercise of the police power of the state in its declared purpose of preventing monopoly and extortion and protecting intra-state commerce and transportation.

"II.

"That the Act of the General Assembly of Tennessee complained of and held by the Court to be in violation of the Fourteenth Amendment to the Federal Constitution is a proper and valid regulation of the gasoline industry affected with the public interest, and which industry is a proper subject of state regulation.

"III.

"That it is within the just and reserved powers of the State of Tennessee to regulate and fix reasonable prices for the sale and distribution within the state of gasoline—a commodity the sale and distribution of which affects, directly and indirectly, all the people of Tennessee.

"IV.

"The opinion and holding of the Court to the effect that the entire Act was unconstitutional was erroneous even if the price-fixing provisions of the Act were beyond the power of the state.

"It was and is the obvious purpose of the General Assembly to exercise all the power the state had or has in regulating the gasoline industry and remedy the evils recited in the Act, and even if that part of the Act relating to fixing prices should be held invalid, the other provisions of the Act separate and distinct therefrom should be sustained and enforced. The Court was therefore in error in failing to sustain all the provisions of the Act except the price-fixing provision, even assuming that to be invalid.

"V.

"The Court was in error in issuing the injunction, because the plaintiff had a plain, adequate, and complete remedy at law."

PROPOSITIONS OF LAW.

I.

The Standard Oil Company of Louisiana, in respect of their intra-state business in Tennessee, is, in fact and in law, the same interests represented by the Standard Oil Company of Kentucky, ousted from doing business in said state, and is not lawfully entitled to carry on its said business therein or to complain of the Act of 1927.

Upon the facts hereinbefore set out (p. 9-12), showing that both the Standard Oil Company of Kentucky and the Standard Oil Company of Louisiana are owned and controlled by the Standard Oil Company of New Jersey, and further showing the manner and circumstances under which the Louisiana corporation was organized and came to do business in Tennessee, the Court will look through the veil or shell of the corporate organization of the latter company to ascertain the real controlling interests for which said Louisiana corporation is acting and for which it was brought into Tennessee, and, having so found, hold that said Louisiana corporation represents the same interests controlling the Kentucky corporation, ousted from the State of Tennessee, and that it is subject to the judgment of ouster

and the injunction prohibiting it from doing business in Tennessee, hereinbefore referred to.

Moriwetz on Private Corporations, Sec. 227;
Cook on Corporations, 6 Ed., Sec. 709;
McGaskill vs. U. S., 216 U. S., 515;
People of N. Y. vs. North River Sugar Refining Co., 121 N. Y., 582, 9 L. R. A., 33;
State Ex Rel Watson vs. Standard Oil Co., 49 Ohio, 137, 15 L. R. A., 156;
Towles & Co. vs. Miles, 131 Tenn., 79;
Dillard and Coffin Co. vs. Richmond Oil Co. 140 Tenn., 298;
LePage Co. vs. Russia Cement Co., 51 Fed. Rep., 941;
Beal vs. Chase, 31 Mich., 490.

II.

A foreign corporation is not entitled to carry on its business in any state except by complying with the conditions prescribed by such state.

Crescent Oil Co. vs. Miss., 257 U. S., 129;
Yeiser vs. Dysart, 267 U. S., 538;
Hall vs. Geiger, 242 U. S., 539;
Caldwell vs. Sioux Co., 242 U. S., 558;
Merrick vs. Halsey, 242 U. S., 569.

In the Crescent Oil Company case, *supra*, this Court, among other things, said:

> "Where, as we have found in this case, a foreign corporation has no Federal right to continue to do business in a state, and where, as here, no contract right is involved and there is no employment by the Federal Government, it is the settled law that a state may impose conditions, in its discretion, upon the right of such a corporation to do business within the state, even to the extent of excluding it altogether. *Horn Silver Mining Co. v. New York,* 143 U. S., 305; *Baltic Mining Co. v. Massachusetts,* 231 U. S., 68, 83, and cases cited. And in such case the inherent difference between corporations and natural persons is sufficient to sustain a

classification making restrictions applicable to corporations only. *Hammond Packing Co. v. Arkansas*, 212 U. S., 322, 343, 344; *Baltic Mining Co. v. Massachusetts*, 231 U. S., 68, 83. And see *Fort Smith Lumber Co. v. Arkansas*, 251 U. S., 532; *American Sugar Refining Co. v. Louisiana*, 179 U. S., 89; *Williams v. Fears*, 179 U. S., 270, 276; *W. W. Cargill Co. v. Minnesota*, 180 U. S., 452.

"This would be sufficient to dispose of this second contention, but we may add that the law assailed was enacted by the state in the exercise of its police power, to prevent a practice conceived to be promotive of monopoly with its attendant evils."

257 U. S., 137.

In the case of Yeiser vs. Dysart, *supra*, this Court held that inasmuch as lawyers practice their profession by virtue of licenses from a state, the state has the right to regulate their charges.

If the State of Tennessee has the right to say to the Standard Oil Company, You shall not do business in this state, has it not the right to say, You may do business in this state only when you are willing to sell gasoline at reasonable and fair prices?

In the Hall, Caldwell, and Merrick cases, *supra*, this Court sustained the Blue Sky Laws of Ohio, South Dakota, and Michigan; and in each of these laws the dealer and owner of securities, stocks, bonds, etc., were prohibited from putting same on the market until they had obtained permits to do business; and we submit that the requirements in reference to the applications for business permits were very similar to those in the Tennessee Act now under consideration.

In each case a Commissioner was given the power to decline to grant a permit unless he was satisfied with reference to the value of the securities offered, the honesty of the business and good character of the dealer or owner offering the securities for sale.

In each case the Commissioner was vested with authority to decline to permit the owner or dealer to do business and

sell the securities in question at all unless and until it was satisfied with reference to the matters indicated.

One can hardly imagine a more drastic limitation on the rights of a person to deal with his own property—yet these acts were sustained as a proper exercise of the police power for the protection of the public.

The proposition above stated and the cases supporting same are particularly applicable to the Fourth Assignment of Error. (*Supra*, p. 19.)

III.

Courts take cognizance of all matters of general knowledge, and may make use of its knowledge of facts with which they have become familiar by a series of preceding cases.

Schollenberger vs. Penn., 171 U. S., 1;
Austin vs. State, 110 Tenn., 563, 566;
United States vs. Teschmaker, 22 Howard, 392;
Knight vs. U. S. Land Association, 142 U. S., 161;
Jameson vs. Ind. Natural Gas Co., 127 Ind., 555;
Sparrow vs. Strong, 3 Wallace, 97, 104;
Muller vs. Oregon, 208 U. S., 412.

In the Schollenberger case, *supra*, it was in effect held that no particular proof is required of those facts which by human observation and experience have become generally known to be true.

In the Austin case, *supra*, it was held that it was not essential that the facts and circumstances should have been recorded in written history or science to entitle courts to take judicial notice of them.

In the Jameson case, *supra*, it was held that courts take judicial notice that natural gas is so far a necessity that the right of eminent domain may be invoked by a corporation to obtain a right of way for its pipe lines.

In Sparrow vs. Strong, 3 Wall, 97, 104, this Court took cognizance of the tremendous growth of the mining interests; therefore, why should it not take cognizance of the unparalleled growth of the marketing or sales of gasoline in Tennessee, and the further fact that this commodity enters into close touch with, and is essential to, nearly every human activity in Tennessee?

In Muller vs. Oregon, 208 U. S., 412 (52 L. Ed.), 551, 555, Mr. Louis D. Brandeis, now Mr. Justice Brandeis, appeared for the State of Oregon and incorporated in his brief numerous authorities for documents, resolutions, and legislation bearing upon the question involved as to whether the State of Oregon had the right to regulate the hours of labor, and it is manifest that these were considered by this Court, it being, among other things, said:

> "We take judicial cognizance of all matters of general knowledge."

IV.

Every presumption and reasonable intendment is in favor of the constitutionality of the Act.

The above proposition is elementary when the validity of an Act of the Legislature, passed with due form and ceremony, is under consideration; but it is not improper to call to the attention of the Court the following cases—Federal and State:

In *Brown vs. Maryland,* 12 Wheat, 436, wherein a statute of Maryland was challenged for repugnance to the commerce clause of the Federal Constitution, Chief Justice Marshall said:

> "It has been truly said that the presumption is in favor of every legislative act, and that the whole burthen of proof lies on him who denies its constitutionality."

In the Sinking Fund cases, 99 U. S., 718, Chief Justice Waite, among other things, said:

> "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

In *Arizona Copper Company vs. Hammer*, 250 U. S., 400 (63 L. Ed. 1058), the Arizona Employer Liability Act was under consideration, and it was insisted that said Act violated the Fourteenth Amendment to the Federal Constitution; and it was, in substance, held that those challenging such legislation designed to promote the general welfare have the burden to show that the effect thereof is unreasonable and arbitrary and has no substantial relation to the end desired before such legislation can be brought within the inhibition of said amendment.

In dealing with the validity of the state's statute the Court will not destroy it except upon the clearest grounds. This rule was applied by this Court in *Knoxville vs. Knoxville Water Company*, 212 U. S., p. 8. In that case there had been findings of fact by a Master and confirmed by the Court upon which it was held that certain water rates were unreasonable, and therefore unlawful. In considering this phase of the case, the Court, speaking through Mr. Justice Moody, said:

> "We need not stop to consider what the effect of such findings would be in an ordinary suit in equity. The purpose of the suit is to arrest the operation of a law on the ground that it is void and of no effect. It happens that in this particular case it is not an Act of the Legislature that is attacked, but an ordinance of a municipality. Nevertheless, the function of rate-making is purely legislative in its character; and this is true, whether it is exercised directly by the Legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the Legislature and must be regarded as an exercise of the legislative power. *Prentis vs. Southern R. Co.*, 211 U. S., 210 ante, 67, 29 Sup. Ct. Rep., 67; *Honolulu Rapid Transit & Land Co. vs. Hawaii*, 211 U. S., 282 ante, 55, 29 Sup. Ct. Rep., 55."

In the case of Atkins vs. Children's Hospital, 261 U. S., 525, 544, this Court said:

> "This Court, by an unbroken line of decisions, from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an Act of Congress until overcome beyond a rational doubt."

See also:

Middleton vs. Texas Power, etc., Co., 249 U. S., 152;
Mt. Timber Co. vs. Washington, 243 U. S., 219;
Green vs. Frazier, 253 U. S., 233;
Manufacturing Co. vs. Falls, 90 Tenn., 466;
State Ex Rel vs. Brewing Co., 104 Tenn., 715, 740;
Railroad vs. Byrne, 119 Tenn., 278, 291, 292.

V.

Upon the facts disclosed in the record the gasoline industry in Tennessee has been devoted to and is clothed with a public interest, and the legislation complained of was enacted in the proper exercise of the police power of the state.

Munn vs. Ill., 94 U. S., 113-154;
Allnutt vs. Englis, 12 East., 527, 539, 542;
Brass vs. North Dakota, 153 U. S., 391;
Budd vs. New York, 143 U. S., 517;
German Alliance Insurance Co. vs. Lewis, 233 U. S., 389, 391, 410, 411, 415-417;
Stafford vs. Wallace, 258 U. S., 495;
Oklahoma Natural Gas Co. vs. Oklahoma, 258 U. S., 234, 237-239;
Wolfe Pack. Co. vs. Court of Industrial Relations, 262 U. S., 522, 535, 536, 538-541;
Oklahoma Operating Co. vs. Love, 252 U. S., 331;
Oklahoma Gin Co. vs. State, 252 U. S., 339;
Rail & River Co. vs. Yappel, 236 U. S., 338;
McLean vs. Arkansas, 211 U. S., 539;
Knoxville Iron Co. vs. Harbison, 183 U. S., 13;
Same case, 103 Tenn., 421;

Dayton Coal, Iron, etc., Co. vs. Barton, 183 U. S., 23;
Same case, 103 Tenn., 604;
Leeper vs. State, 103 Tenn., 500-531, 532.

ARGUMENT.

TO WHAT DOES THE POLICE POWER OF THE STATE EXTEND?
It has never been limited by express definition.

In Cooley on Constitutional Limitations, p. 707, it is said:

> "Police power in its broadest acceptation means the general power of a government to preserve and promote public welfare, even at the expense of private right."

In People vs. Budd, 117 N. Y., 1 (affirmed by this Court in 143 U. S., 517), it was, among other things, said:

> "All property, all business, every private interest may be affected by it and brought within its influence. Under it the Legislature regulates the use of property, prescribes rules of personal conduct, and in numberless ways, through its pervading and ever-present authority, supervises and controls the affairs of men in their relation to each other and to the community at large, to secure the mutual and equal rights of all, and promote the interest of society. It has limitations; it cannot be arbitrarily exercised to deprive the citizen of his liberty or his property. But a statute does not work such a deprivation in the constitutional sense sim-

ply because it imposes burdens or abridges freedom of action, or regulates occupations, or subjects individuals or property to restraints in matters in difference, except as they affect public interests or the rights of others. Legislation under the police power infringes the constitutional guaranty only when it is extended to subjects not within its scope and purview, as that power was defined and understood when the Constitution was adopted. The generality of terms employed by jurists and publicists in defining the power, while they show its breadth and the universality of its presence, nevertheless leave its boundaries and limitations indefinite, and impose upon the court the necessity, as each case arises, to determined whether the particular statute falls within or outside of its appropriate limits."

It extends to the safety, health, morals, comfort, and welfare of the people and expands to meet new conditions.

Leeper vs. State, 103 Tenn., 532;
Knoxville Iron Co. vs. Harbison, *supra;*
Dayton Coal, Iron, etc., Co. vs. Barton, *supra;*
Knoxville vs. Knoxville Water Co., 107 Tenn., 686.

In Leeper vs. State, 103 Tenn., 500-531, *et seq.*, it was, among other things, said:

"What is the scope and meaning of the term 'police power' has never been defined. The Supreme Court of the United States has expressly declined to define its limits. Stone v. Miss., 101 U. S., 814.

"In Mayor of New York v. Miln, 11 Pet (U. S.), 139, it is said: 'It embraces every law which concerns the welfare of the whole people of the state, or of any individual within it and upon the persons and things within it.'

"In Hanibal R. R. Co. v. Husen, 95 U. S., 465, it is said: 'The police power of a state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and to the protection of all property within

the state, and hence to the making of all regulations promotive of domestic order, morals, health, and safety.'

"In Smith v. The State, 16 Pickle, 505, it is said, in substance, that it extends to all questions of health, morals, safety, order, comfort, and well-being of the public, and that this enumeration does not make the list complete."

In In Re: Rahrer, 140 U. S., 554, the Supreme Court of the United States, speaking through Mr. Justice Fuller, said:

"The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. And this court has uniformly recognized state legislation, legitimately for police purposes, as not, in the sense of the Constitution, necessarily infringing upon any right which has been confided expressly or by implication to the national government. The Fourteenth Amendment, in forbidding a state to make or enforce any law abridging the privileges and immunities of citizens of the United States, or to deprive any person of life, liberty, or property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws, did not invest, and did not attempt to invest, Congress with power to legislate upon subjects which are within the domain of state legislation."

As above stated, this Court has not, by express definition, limited the extent and application of the police power of a state, and has laid down no hard and fast rule restricting its exercise to any given class of cases.

New circumstances and new conditions must be dealt with

as they arise, and frequently a business which, under ordinary circumstances, would be treated as purely private business, becomes through its increased importance to the public welfare, charged with a public interest.

As stated by the Court in *Wolff vs. Industrial Court*, 262 U. S., 522:

> "Businesses which, though not public at their inception, may be fairly said to have risen to be such, and have become subject in consequence to some government regulation. They have come to hold such peculiar relation to the public that this is superimposed upon them."

In the case of *German Alliance Insurance Co. vs. Lewis, supra*, this Court sustained an Act extending and applying the police of the state to the regulation of the business of fire insurance companies and fixing the prices to be charged.

In the case of *Rail & River Co. vs. Yaple, supra*, this Court said:

> "The objection that the law is unconstitutional as unduly abridging the *freedom of contract* is prescribing the particular method of compensation to be paid by employers to miners for the production of coal was made in the case of *McLean v. Arkansas*, 211 U. S., 539, 53 L. Ed., 315, 29 Sup. Ct. Rep., 206, in which the court sustained a law of the State of Arkansas, requiring coal mined to be paid for according to the run-of-mine system according to its weight when brought out of the mine in cars. In that case the constitutional objections founded upon the right of contract which are made here were considered and disposed of. This court has so often affirmed the right of the state, in the exercise of its police power, to place reasonable restraints like that here involved, upon the freedom of contract, that we need only refer to some of the cases in passing. *Schmidinger v. Chicago*, 226 U. S., 578; 57 L. D., 364; 33 Sup. Ct. Rep., 182; Ann Cas. 1914B, 284; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S., 549; 55 L. Ed., 328; 31 Sup. Ct. Rep., 259, and cases cited therein and reviewed."

These are but a few of the cases holding that the police power of the state expands to and controls all conditions, as they arise, affecting the safety, health, morals, comfort, and welfare of the people, and meeting new conditions as progress—yes, evolution, if you please—in business conditions, converts a former convenience or luxury into an absolute necessity. And this Court will be slow to review, if it does not hold that it cannot review, the economies and facts upon which the Legislature bases its conclusions that an existing evil should be remedied by an exercise of its police powers.

Central Lumber Co. vs. South Dakota, 226 U. S., 157, 161.

The facts relied on showing that the gasoline industry is clothed with a public interest are not denied.

The facts are, as hereinbefore set forth (pp. 9-15), and as more fully disclosed in the answer of the appellants. R., pp. 27, 32, 35-54.

It is to be noted that neither in its bill as originally filed, nor by any amendment thereto, for which it had full opportunity, did the Standard Oil Company of Louisiana anticipate or attempt to deny the existence of the facts and conditions set forth in the answer, which caused the Governor of Tennessee to appeal to the Legislature for the relief of the public generally, and which resulted in the enactment of the legislation complained of.

Now, for the purpose of applying the principles controlling rate or price regulation to the evils complained of by the State of Tennessee, we ask the Court's indulgence while we re-state, briefly as may be, the practically undenied conditions sought to be changed and remedied by the General Assembly of Tennessee:

1. *Matters of common knowledge of which this Court can take cognizance.*

It is practically impossible, and deemed unnecessary, to set out all of such matters bearing upon the issues in this case; but, generally speaking, it is commonly known that the Standard Oil Companies, and other dealers or subsidiaries

to it, or confederated with it, endeavor to control and dominate the gasoline industry, to the injury of the public, by price-fixing and cutting to destroy competition, by rebates and discriminations in favor of retail dealers and customers in localities where a monopoly can be more easily secured by such practices.

These conditions are well described in an opinion of the Circuit Court of Appeals for the Second Circuit, in the case of *Mennen Company vs. Federal Trade Commission,* 288 Fed. Rep., 774, 778, 779, where, among other things, it is said:

> "It is a matter of common knowledge that prior to the enactment of the Clayton Act a practice had prevailed among large corporations of lowering the prices asked for their products in a particular locality in which their competitors were operating for the purpose of driving a rival out of business. Such lowering of prices was maintained within the particular locality while the normal or higher prices were maintained in the rest of the country; and this practice was continued until the smaller rival was driven out of business, whereupon the prices in that locality would be put back to the normal level maintained in the rest of the country. The Clayton Act was aimed at that evil. This appears from the report of the Judiciary Committee of the House of Representatives, from which we quote as follows:
>
> " 'Section 2 of the bill is intended to prevent unfair discriminations. It is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also some smaller concerns which seek to secure a monopoly in trade and commerce by aping the methods of the great corporations, have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country. . . .
>
> " 'The necessity for legislation to prevent unfair dis-

criminations in prices with a view of destroying competition needs little argument to sustain the wisdom of it. In the past it has been a most common practice of great and powerful combinations engaged in commerce —notably the Standard Oil Company, the American Tobacco Company, and others of less notoriety, but of great influence—to lower prices of their commodities oftentimes below the cost of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made. . . .

" 'In seeking to enact section into law we are not dealing with an imaginary evil or against ancient practices long since abandoned, but are attempting to deal with a real, existing, widespread, unfair and unjust trade practice that ought at once to be prohibited in so far as it is within the power of Congress to deal with the subject.' "

2. *The history of the petroleum industry, as portrayed by the decisions of this Court,* and other courts of last resort, is referred to in the answer of appellants (R., pp. 27, 32, 35-50), is known to this Court, and is not denied by appellee.

Standard Oil Co. vs. State of Tenn., 117 Tenn., 618;
State vs. Standard Oil Co., 120 Tenn., 86;
Standard Oil Co. vs. U. S., 211 U. S., 1;
Standard Oil Co. vs. State, 217 U. S., 817;
Standard Oil Co. vs. Mo., 224 U. S., 761;
Waters Pierce Oil Co. vs. Texas, 212 U. S., 86;
Standard Oil Co. vs. State, 107 Miss., 227;
State vs. Standard Oil Co., 15 L. R. A., 145; 49 Ohio State, 137;
State vs. Standard Oil Co., 218 Mo., 1.

These cases disclose the unrelenting and unswerving determination on the part of the Standard group, the dominant factor in the petroleum industry, to monopolize and control

the entire industry, and this purpose has continued from the original organization of the Standard Oil Trust until the present day.

The methods employed, as set out in the opinion of Chief Justice White in *Standard Oil Co. of New Jersey vs. United States*, 221 U. S., 1, were to destroy competition by rebating, price-cutting, discriminatory practices, and the division of marketing territory among the various Standard groups.

The learned Chief Justice said in his opinion that from the facts establishing this purpose and intent it was "*so certain as practically to cause the subject not to be within the domain of reasonable contention.*"

The holding and opinion of the learned and lamented former Chief Justice of this court in the case just referred to is so illuminating of conditions existing then and continuing to exist to the present day, that we deemed it proper to refer thereto in the answer of appellants (R., pp. 38, 47), and to aver that such conditions continued to exist in these United States and in the State of Tennessee.

3. *Dealers in gasoline in Tennessee have, in fact, a monopoly of that business.*

The facts in general terms in respect to the widespread and enormous use of gasoline in Tennessee in practically every department of human activity and concern are, as hereinbefore set forth (*supra*, pp. 12-15) and stated in appellant's answer.

R., pp. 52, 53.

It is shown that in the year 1926 there were sold and used in Tennessee 129,358,213 gallons of gasoline—an increase in sales and use of more than 39,000,000 gallons over that sold and used in the year 1924.

The appellee, and other dealers in gasoline, and their representatives, have done all in their power to devote gasoline to the public use by sedulous, widespread, continuous, informative propaganda as to its useful qualities in the home, in business, and in every department of life, and thereby have induced the people of Tennessee to purchase the enormous amount of gasoline hereinbefore referred to,

and to so apply it to practically all departments of life that it has become an absolute necessity—which can be procured only from gasoline dealers in Tennessee whose charges and prices are sought to be regulated by the Act in question, so that—and only to the extent that—the citizens may secure this necessity at a *reasonable* price and the dealer may secure a *reasonable* profit or return.

4. *Ouster from the state under the anti-trust Acts would not give relief to the people of Tennessee.*

Tennessee has an Act inhibiting combinations and agreements lessening and tending to lessen full and free competition in the sale of commodities in Tennessee, which was sustained and enforced by the Supreme Court of that state and by this Court in the case (120 Tenn., 86; 217 U. S., 817) above referred to.

But while the appellee and other dealers in Tennessee, as shown upon this record, have been guilty of the unlawful practices denounced by said anti-trust Act, nevertheless it is manifest that to oust them from Tennessee would not afford relief.

This is shown by what happened when the Standard Oil Company of Kentucky was ousted by this Court, affirming the decree of the Supreme Court of Tennessee.

If these companies now doing business in Tennessee and guilty of practices denounced by said anti-trust Act were ousted from the state, it is practically sure that, in respect of the appellee, its place would be taken by another company of the Standard Oil group, and the place of other corporations would be taken by other companies—all claiming the right to sell this article of necessity—this article monopolized by them—at any price fixed by them, and by any means and methods, though denounced by the laws of Tennessee, used and invoked by them to control and dominate the gas industry of Tennessee to the hurt and injury of her people.

It is respectfully insisted that every measure or remedy hitherto intended to regulate this industry falls far short of relief to the people of Tennessee, and that such relief can only be applied effectively through this price-fixing statute

which guarantees to the dealer a reasonable price for his gasoline—and which, in effect, so far as legislation may avail, guarantees to the dealer a reasonable and fair price for his gasoline.

In this connection permit us to call to the attention of the Court a part of a report of a Senate Investigating Committee.

After more than fifty years of anti-trust legislation, Federal and State, and litigation thereunder attempting to curb the evils hereinbefore set out, the matter was investigated by the Manufacturers' Committee of the United States Senate in the winter of 1923; and in March of that year said committee, after having devoted several months to hearing testimony, and after having examined officials of the leading petroleum companies, made an exhaustive report to the Senate, and, in concluding said report, said:

> "It must be obvious from the facts set forth in this report that the business cannot go on as at present organized and conducted. It is essential to the life of the industry and vital to the public also that neither the public nor the small independent producers and refiners shall be left as at present at the mercy of a combination which advances or decreases prices as it pleases. Unless some means can be found to prevent the manipulation of prices by the large companies, and particularly the Standard group, it is as certain as a future event can be that gasoline prices in the near future will be so advanced as to put gasoline beyond the reach of the public generally as a motor fuel. Great as the capital invested in the business has become, important as the business is to thousands who are engaged in it, and to other thousands who receive dividends from it, *there is still more important interest to be reckoned with, and that is the interest of the public. Petroleum and its products have become an absolute necessity. The business is clothed with a great public interest. The gas plants, electric light plants, railroads, and street cars are no longer greater universal necessities than petroleum and its products.*"

The legislation challenged by the appellee Oil Company, and the other oil industries in Tennessee, is sustained by the decisions of this court as a valid exercise of the state's police power.

The cases referred to and relied upon for the proposition just stated are those cited under our fifth proposition of law, *supra* (p. 26), and others which have received full consideration by this Court in its opinions delivered within recent years; and it is not deemed necessary to discuss and analyze all of them, and we will confine our discussion to some of them hereafter to be noted.

We are not unmindful of the recent decisions of this Court relied upon by appellee, and particularly the cases of *Tyson vs. Banton,* 264 U. S., 140; *Fairmont Creamery Co. vs. Minnesota,* 274 U. S., 1; and *Ribnik vs. McBride,* decided on May 28, 1928.

These cases are clearly distinguishable in their facts from the case at bar.

The distinction between a place of amusement or selling of theater tickets (Tyson vs. Banton, *supra*) and a commodity of such universal use—a commodity absolutely essential to modern conditions—as gasoline, is too obvious for discussion.

In the *Creamery case,* as we understand it, this Court treated the question submitted to it as being, in substance, whether the Creamery company had the right to enter into a fair and "normal contract, long regarded not only essential to the freedom of trade in commerce, but also beneficial to competitors." That is not this case, nor anything akin to it.

The Act now in question before your Honors is intended to provide a fair and reasonable price to the dealer and to prevent the destruction of competition, the use of rebates and discriminations between customers, long denounced by both Federal and State statutes.

In the *Ribnik case* the Court merely held that the business of an employment agent is not so affected with a public interest as to enable the state to fix charges to be made by said agent.

So it is respectfully submitted the facts of this and the cases above referred to are clearly distinguishable from the undisputed facts shown in this record which brought about the passage of the Act to relieve against the evils to the public therein referred to.

THE MUNN, ALLNUT, AND WOLFF CASES.

The principles announced and enforced in these cases sustain the Act complained of upon two grounds:

(1) The gasoline industry in Tennessee has been carried on, and is being carried on, in such a manner as makes it of utmost public consequence affecting the community.

(2) Dealers in gasoline, though without a grant or governmental franchise, have a virtual monopoly of the sale and distribution of gasoline in Tennessee.

The undisputed facts above referred to sustain both propositions and bring this case directly within the principle announced in the three cases above referred to.

The Munn case is the guidepost—the chart.

In the Munn case (94 U. S.), this Court, speaking through Chief Justice Waite, said:

> "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to being controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."
>
> R., p. 126.

And again:

> "Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin,

that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long known and well established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner."

R., p. 133.

Further, in the Munn case, it is recognized that a monopoly, though not built upon a governmental grant or franchise, justifies regulation of rates and prices.

This Court followed some of the early English cases dealing with this particular question—among others, the case of *Allnut vs. Inglis*, 12 East, 527.

In that case it is held that the right of a state to regulate charges applies not only to monopolies arising out of a grant from the sovereign, *but also to conditions where there is in fact a monopoly.*

In discussing this question, Lord Ellenborough, C. J., among other things, said:

"The question then is, whether, circumstanced as this company is, by the combination of the Warehousing Act with the Act by which they were originally constituted, and with the actually existing state of things in the Port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a reasonable compensation for such warehousing. And, according to him, whenever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he

is confined to take reasonable compensation only for the use of the wharf."

And further on:

"It is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches, as laid down by Lord Hale in the passage referred to (that from De Portibus Maris already quoted), which includes the good sense as well as the law of the subject." (Italics are ours.)

The Allnut case was approved by this Court in the Munn case, and, to us it seems, entered largely into the result reached by the Court.

In the *Wolff* case this Court had under consideration a Kansas statute involving the right of a state, through an Industrial Commission, to practically take charge of a Packing Company, fix rates of labor, compel a continuance of business, etc.; and in determining the validity of said statute, this Court, among other things, said:

"Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament of Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. *State v. Edwards,* 86 Mo., 102; *Terminal Taxicab Co. v. District of Columbia,* 241 U. S., 252, 254.

"(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner and to be entitled to protection accordingly. *Munn v. Illinois*, 84 U. S., 113; *Spring Valley Water Works v. Schettler*, 110 U. S., 347; *Budd v. New York*, 117 N. Y., 1, 27; s. c. 143 U. S., 517; *Brass v. Stoeser*, 153 U. S., 391; *Noble State Bank v. Haskell*, 219 U. S., 104; *German Alliance Insurance Co. v. Lewis*, 233 U. S., 389; *Van Dyke v. Geary*, 244 U. S., 39, 47; *Block v. Hirsh*, 256 U. S., 135."

262 U. S., pp. 535, 536.

"In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation."

"To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of

such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation."

262 U. S., p. 539.

And on page 540 quoted the following from the Munn case:

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control.*"

It is insisted that the undisputed facts of this case, hereinbefore referred to, bring this case squarely within the third classification above set out.

Whatever may have been the nature of the gasoline industry in its beginning, certainly it has come to be of such public consequence as subjects itself to governmental regulation.

"Public consequence" not only by reason and character of business and the manner in which it is carried on, but because said business as carried on in Tennessee, is a virtual monopoly requiring regulation for the protection of the public.

In the case of *Van Dyke vs. Geary*, 244 U. S., 39, this Court sustained an Act of the State of Arizona under which a water system, owned by private individuals, was regulated by the Utilities Commission and its prices thereby fixed, notwithstanding the fact that the owners had none of the franchise rights or privileges referred to in Chief Justice Taft's first classification. The Court placed the case

in the third classification under the authority of the Munn case and sustained the price-fixing Act because—quoting from the Munn case:

> "Property becomes clothed with a public interest when used in a manner to make it of public consequence and to affect the community at large."

VI.

If the price-fixing features of this Act are invalid, nevertheless the other regulatory features are valid, and should be sustained, as insisted in the Fourth Assignment of Error. (R. 134, 135.)

OPINION OF DISTRICT COURT.

On this subject the lower court held:

> "It is further argued for the state that even though it be held that the Act is invalid in so far as it attempts to confer upon the state the power to fix the prices at which gasoline shall be bought and sold, the purposes of the Act are so varied and separable that it may and should be upheld in other particulars. If it may be said that with the price-fixing features of the Act stricken therefrom the legislation would have been enacted, the entire Act should not be declared invalid. The Act itself provides 'that if any section or provision of this Act shall be held invalid, this shall not affect the validity of other sections or provisions thereof.' There are thirteen sections in the Act, the first of which is in the form of a preamble referred to, the next nine deal in the main with the subject of regulating and fixing the prices of gasoline, Section 11 defines the term gasoline, Section 12 provides, as we have just stated, that if any section of the Act shall be held invalid it shall not affect the other sections or provisions thereof, and Section 13 provides only for the effective date of the Act. *Notwithstanding the legislative declaration, it seems clear to us that the main*

purpose of the Act is to regulate and fix the prices at which gasoline shall be bought and sold, and it is inconceivable that except for that purpose the legislation would have been enacted." (R., p. 128.) (Italics are ours.)

ARGUMENT IN SUPPORT OF FOURTH ASSIGNMENT OF ERROR. (R., pp. 134, 135.)

We respectfully challenge the correctness of the conclusion and holding of the learned District Court. On the contrary, we submit that the Legislature of Tennessee intended to exert *all its sovereign* power in regulating this industry and prohibiting all the evils in the trade it had the power to prohibit.

Price-fixing was but *one* of the remedies. The obvious desire of the Legislature was to invoke *every possible remedy*. This is shown by the message of the Governor to the Legislature and by the preamble in the first section of the Act. (R., p. 16.) The regulatory features of this Act, aside from the price-fixing features, are aimed at the evils in the trade described by the Governor in his message, and shown to have existed for many years by the judicial history of the business and the plaintiff in this cause.

SEVERABLE PROVISIONS OF THE ACT ANALYZED.

The following provisions of the Act are clearly valid:

Provision requiring permits and the collection of data.

Section 1 provides for the establishment of a division of motors and motor fuel, which should be in charge of a superintendent to be appointed as other superintendents of divisions of the Department of Finance and Taxation. (R., p. 16.)

Section 2 provides that it shall be the duty of this superintendent to make investigations, collect data concerning the manufacture and sale of gasoline, the manner of carrying on the trade and business, the methods employed by dealers. This data was for the purpose of (a) aiding and fixing prices, and (b) that it "should be available for the inspec-

tion and information of the public, and said Commissioner is authorized, when deemed necessary, to make public by publication or otherwise the information secured hereunder." (R., pp. 16, 17.)

In view of the evils sought to be remedied, it is clear that the provision for the collection of this data and the publication of same would be a valuable aid in suppressing the evils complained of.

The State of Tennessee had an anti-trust Act passed in 1903, the first section of which provides:

> "Section 1. Be it enacted by the General Assembly of the State of Tennessee, and it is hereby enacted by the authority of the same, that from and after the passage of this Act, all *arrangements*, contracts, agreements, trusts or combinations between persons or corporations made with a *view to lessen*, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state, or in the manufacture and sale of articles of domestic growth or of domestic raw material, and all *arrangements*, contracts, agreements, trusts or combinations between persons or corporations *designed*, or which tend to *advance, reduce or control the price* or the cost to the producer or consumer of any such product or article, are hereby declared to be against public policy, unlawful and void."

This Court has sustained the validity of this Act in its application to the unfair practices of the Standard Oil Company.

Standard Oil Co. vs. State, 217 U. S., 817.

This Act was amended by the Legislature in 1927, at the same session and just prior to the passage of the Act in controversy, the first section of which amendment is as follows:

> "Be it enacted by the General Assembly of the State of Tennessee, that Section 1, of Chapter 140, Acts of

Tennessee, 1903, page 268 thereof, known as the Anti-Trust Act, be amended as follows:

"That any arrangement, contracts and agreements that may be made by such corporation or person, by and between its agents and sub-agents, to sell and market its products and articles, manufactured in the state, or imported into this state, to any producer or consumer, *at prices reduced below the cost of production* or importation into this state, including the cost of marketing and a *reasonable and just marginal profit to cover wages or management and necessary incidentals, as is observed in the usual course of general business,* and contiuues such practice under such agreements, contracts and arrangements for an unreasonable length of time, to the injury of full and free competition, or make any other arrangements, contracts or agreements, by and between its agents and sub-agents, which tend to lessen full and free competition in the sale of all such articles manufactured and imported into the state, and which amount to a subterfuge for the purpose of obtaining the same advantage and purpose, are hereby declared to be against public policy, unlawful and void."

Ch. 60, p. 201 of Acts of 1927.

It is quite clear that the data the superintendent is required by *Section 2* to ascertain and publish will be of great assistance to the officials of the state in enforcing the Anti-Trust Act, and this "pitiless publicity" of evil practices would prevent in some measure at least some of the evils complained of.

The case of Weller vs. New York, 268 U. S., 319, 322, and the case of Tyson vs. Banton, *supra,* involved the same statute of the State of New York. The main purpose of that Act was to fix the price of theater tickets and prevent the resale of tickets at any higher price, and it was made unlawful to do so without a license.

The Act appears in Sections 167 to 174 of the General Business Laws of the State of New York.

Section 168 provides that all those dealing in the resale

of theater tickets should secure a license; such license should be granted upon the written application setting forth such information as the Comptroller might require.

Section 169 provides that the applicant should file with his application a bond conditioned that the applicant will not be guilty of any fraud or extortion, and will not exact or receive a price for any such ticket in excess of the price authorized by this article. This section further provides that a suit to recover on the bond might be brought by the Comptroller or on the relation of any party aggrieved.

Section 170 provides that if any licensee should be guilty of any fraud or misrepresentation, or shall charge for any ticket a price in excess of that authorized by the article, the Comptroller is authorized to revoke his license.

Section 171 authorizes the investigation of the business methods of such licensee.

Section 172 provides that no license shall issue to sell any ticket to a theater or other place of amusement at a price in excess of fifty cents in advance of the price printed on the face of the ticket.

Section 173 provides that any person violating the provisions of the Act by failing to procure a license and file the required bond shall be guilty of a misdemeanor.

Section 174 provides that any part of the Act declared invalid shall not affect the validity of the remaining provisions.

The defendant was indicted for a failure to apply for and obtain the license required by the Act. On the trial it was insisted that the price-fixing provisions of the Act were invalid.

The Court of Appeals of New York sustained a conviction. In affirming this conviction, the Supreme Court of the United States said:

> "In an extended opinion the latter court upheld the challenged enactment, but said nothing of the possibility of sustaining the license provisions if those relating to re-sale prices were invalid.
>
> "Counsel for plaintiff in error now insists that the two provisions are inseparable; that those which un-

dertake to establish re-sale prices are clearly invalid; and, consequently, the whole Act must fall. On the contrary, counsel for the people maintain that the power of the state to require such license is clear, and that we need not determine the validity of the price restrictions.

"It is not and, we think, it cannot seriously be argued that the state lacked power to require license of those engaging in the business of re-selling theater tickets.

"The conviction and sentence were for failure to observe that requirement. In the absence of an authoritative announcement of another view by some court of the state, we shall hold this provision severable and valid. *Brozee v. Michigan*, 241 U. S., 240. The statute itself declares (174): 'In case it be judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect the validity of the remaining provisions of the article.' If 172, which restricts re-sale prices, were eliminated, a workable plan would remain. See *Dorch v. Kansas*, 264 U. S., 286. The judgment of the court below is affirmed."

268 U. S., pp. 324, 325.

It will be noticed that in the case of *Tyson vs. Banton* the plaintiff complied with the valid provisions of the Act. The Court, in speaking of the Tyson Company, said:

> "It is duly licensed under Section 168, Ch. 590, New York Laws, 1922, and has given a bond under Section 169 of that chapter in the penal sum of $1,000.00 with sureties, conditioned, among other things, *that it will not be guilty of any fraud or extortion.* (See Weller v. New York, 268 U. S., 319, 322."

Certainly the New York Act was no more severable than the Act we are dealing with.

The principal object of the New York Act was to limit the prices to be charged by the ticket dealers. The appli-

cation provided for in Section 168 of the Act must be accompanied by the bond provided for in Section 169.

It is obvious that after the elimination of the provisions held in the Tyson case to be invalid, only a part of the requirements as to the provisions of the bond in Section 169 are necessary to be complied with.

It is clear that the bond filed by Tyson only contained a part of the provisions of 169, as Mr. Justice Sutherland recites that the bond was conditioned, among other things, "that it will not be guilty of any fraud or extortion."

Treating the price-fixing provisions of the Act as invalid, necessarily eliminates that part of Section 169 with reference to the provision of the bond that recites: . . . "will not exact or receive a price for any such ticket or evidence of the right of entry, in excess of the price authorized by this Act."

Nor could a suit be brought to recover for a charge made in excess of this price, as provided in this bond.

In like manner that part of Section 170 providing for the revocation of licenses when a price in excess of that fixed has been charged must be eliminated. With this exception, the balance of the section is of course sustained.

In other words, in that case the Court not only eliminates sections, but parts of sections and parts of sentences in order to save a part of the Act.

In the instant case there is much more reason for sustaining the preliminary provisions of this Act in view of the history of the gasoline industry and the attempts of the state to regulate it.

In the case of *State vs. Howitt*, 107 Kansas, 423 (later affirmed by this Court), the Court sustained part of the Industrial Relations Act, although the main features of that Act were held unconstitutional in the Wolffe case, 262 U. S., 522.

The Court said:

> "It is quite clear that the part of the Act relating to the conduct of an investigation could be upheld, although some of the attempted grants of power should be held void, even if the statute contained no reference

to the effect of partial invalidity. However, one section of it reads as follows:

" 'If any section or provision of this Act shall be found invalid by any court, it shall be conclusively presumed that this Act would have been passed by the Legislature without such invalid section or provision, and the Act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court.' (Laws 1920, Special Session, Ch. 29, Sec. 28.)

"The rule is familiar that a part of a statute which is unobjectionable in itself may be enforced notwithstanding another part is adjudged unconstitutional, if it appears that the void portion was not an inducement to the enactment of the rest—that the Legislature desired the unobjectionable part to become a law irrespective of the validity of the remaining. *Here the express declaration disposes of any possible doubt that might otherwise exist as to the legislative intent,* and requires the court to give all portions of the statute that do not in themselves violate some constitutional provisions. (The State v. Wilson, 101 Kansas, 789, 806; 159 Pac., 679.)

"No reasons are suggested, and none occur to us, why the Legislature may not authorize the court of industrial relations to conduct an inquiry into conditions existing in the mining fields, and in furtherance of that inquiry, require the attendance of witnesses."

See also Sallee v. Dalton, 213 S. W., 762;
Richardson v. Young, 122 Tenn., 471, 522-524;
Shea v. Mining Company, 55 Mont., 522;
State v. Trewitt, 113 Tenn., 561, 572.

In the cases of *Hall v. Geiger,* 242 U. S., 538; *Caldwell v. Sioux Falls Co.,* 242 U. S., 558; and *Merrick v. Halsey,* 242 U. S., 568, this Court sustained the Blue Sky Laws of the States of Ohio, South Dakota, and Michigan.

In each of these Acts the dealers in and owners of secu-

rities, stocks, bonds, etc., were prohibited from putting same on the market until they obtained a permit to do business. The requirements with reference to the application for the permits in these cases were very similar to those in the Act we are considering.

In each case a Commissioner was given the power to decline to grant a permit unless he was satisfied with reference to the value of the securities offered, the honesty of the business, and the good character of the dealer or owner offering the securities for sale.

In each case the Commissioner was vested with authority to decline to permit the owner or dealer to do business and sell the securities in question at all unless and until he was satisfied with reference to the matters indicated.

One can hardly imagine a more drastic limitation on the rights of a person to deal with his own property—yet these Acts were sustained as a proper exercise of the police power for the protection of the public.

Section 3 of the Tennessee Act makes it unlawful for any person, firm, or corporation to engage in the intra-state sale of gasoline without having obtained permit as provided in Section 2. Obviously this section is valid. (R., p. 17.)

Section 4 (R., pp. 17, 18) provides that every person, firm, or corporation desiring to engage in intra-state commerce in gasoline in this state shall make application to the Superintendent of the Division of Motors and Motor Fuels for permit, and in this application he must set out the following information:

> "(a) Whether he proposes to do a wholesale or retail business, or both; and if a wholesale business, the number and location of the different places at which he intends to operate; and if a retail business, the number and location of the different service stations and pumps he intends to operate.
>
> "(b) If the applicant is an individual, give his name and address; if a partnership, the names and addresses of the members of the firm, the style of the firm, and the place or places at which it is intended to do business; if a domestic corporation, the location of its

principal office and the names and addresses of its principal officers; if a foreign corporation, the state of its incorporation, its principal place of business in the state where chartered, and its principal place of business in this state, as well as the names and addresses of its principal officers, and the name and address of its principal agent or agents in this state.

"(c) The price or prices at which said dealer is at the time of the application selling gasoline at the different locations where he sells the same.

"(d) The cost price of such gasoline to said dealer, including the refinery cost, transportation cost, taxes and inspection fees, the cost of distribution, and such other costs and expenses as may enter into the price at which it is proposed to sell such gasoline.

"(e) The price or prices at which he proposes to sell gasoline as a wholesaler and as a retailer.

"(f) Such other information as may be prescribed by the Superintendent."

The propriety and importance of requiring this information is too obvious for discussion, in view of the history of the gasoline industry and the evils sought to be remedied. This information is absolutely essential if the provisions against rebating hereinafter to be referred to are valid, and in any event this information is of very great value to the officials of the state in enforcing the Anti-Trust Act.

Sections 5 and 6 (R., pp. 18-20) give the Commissioner the power to decline a permit to the dealer if the prices fixed by him are deemed improper, and the power to fix the price is given to the Commissioner of Finance and Taxation. If the price-fixing provisions of the Act are unconstitutional, all of Sections 5 and 6 are invalid except the preliminary provision for the issuance of the permit. Section 7 would in like manner be inoperative.

The provisions prohibiting rebating and discrimination are valid.

That part of *Section 8* (R., p. 21) which reads as follows violates no provision:

"Be it further enacted, That it shall be unlawful for any person, firm or corporation, engaged in intra-state wholesale or retail gasoline business in Tennessee to grant any rebate to any customer or purchaser of said gasoline from any dealer, or to sell to any such purchaser or customer at a price different from that filed with the Commissioner of Finance and Taxation, or to grant any concession or gratuity, directly or indirectly, to any customer or purchaser for the purpose of inducing said purchaser or customer of said dealer to purchase, use or handle the gasoline of said dealer; and it shall be unlawful for any person, firm or corporation engaged in intra-state wholesale or retail sale of gasoline in Tennessee to discriminate against or in favor of any customer or purchaser of said dealer by selling at a different price to said purchasers in different localities in Tennessee to discriminate against or in favor of any customer or purchaser of said dealer by selling at a different price to said purchasers in different localities in Tennessee or to different purchasers in the same locality, provided the dealer may take into consideration the difference in freight rates to different localities."

The right to sell one's property at any price he chooses, as we have seen, is not an absolute right. A denial of this unlimited right is at the foundation of all the anti-trust Acts. That price cutting and rebating has been one of the most potent weapons used by companies dealing in petroleum products for the destruction of competition and monopolizing the trade is undeniable. Chief Justice White especially emphasized this fact in the *Standard Oil case*, 221 U. S., p. 1. It was for this offense that the Standard Oil Company was ousted from Tennessee, 120 Tenn., 86. It was for this the Standard Oil Company of Indiana was ousted from *Missouri*, 224 U. S., 761. This was the basis for injunction in the case of *Nash v. United States*, 259 U. S., 273, and in *State v. Standard Oil Company*, 173 Federal, 177.

If rebating, price cutting, and discrimination may be prohibited by injunction, why may they not be prohibited by legislation? This question is put at rest by the decision of this Court in the case of *Central Lumber Company v. South Dakota*, 226 U. S., 157. In that case an Act of the Legislature prohibiting discrimination in prices between different sections or communities, and which prohibited the selling of any commodity at a lower price in one section or one community than in another section or community, after equalizing the distance, was attacked, because it was insisted that it violated the Fourteenth Amendment to the Constitution of the United States.

It was insisted that the Act was:

> "Intended for the protection of only a particular class—regularly established dealers; and because it unreasonably limits the rights of the people to make such bargains as they like."

It was also insisted that:

> "All competition . . . imports an attempt to destroy or prevent the competition of rivals, and there is no difference in principle between the prohibited act and the ordinary efforts of traders at a single place."

To which the Court responded:

> "The premises may be conceded without accepting the conclusion that this is an unconstitutional discrimination. If the Legislature shares the now prevailing belief as to what is public policy, *and find that a particular instrument of trade war is being used against that policy in certain cases*, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."

And again:

> "We must assume that the Legislature of South Dakota considered that the people selling in two places

made the prohibited use of their opportunities, and that such use was harmful, although the usual efforts of competitors were desired. It might have been argued to the Legislature with more force than it can be to us that recoupment in one place of losses in another is merely an instance of financial ability to compete. If the Legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their state, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economies or their facts. That the law embodies a widespread conviction appears from the decisions in other states. State v. Drayton, 82 Neb., 254, 23 L. R. A. (N. S.), 1287, 130 Am. St. Rep., 671, 117 N. W., 768; State ex rel. Young v. Standard Oil Co., 111 Minn., 85, 126 N. W., 527; State v. Fairmount Creamery Co., 153 Iowa, 702, 42 L. R. A. (N. S.), 821, 133 N. W., 895; State v. Bridgman & R. Co., 117 Minn., 186, 134 N. W. 496."

And again:

"But the Supreme Court says that the statute is aimed at preventing the creation of a monopoly by means likely to be employed, and certainly we should read the law as having in view ultimately the benefit of buyers of the goods. Finally, as to the statute's depriving the plaintiff in error of its liberty because it forbids certain class of dealings, we think it enough to say that as the law does not otherwise encounter the Fourteenth Amendment, it is not to be disturbed on this ground. The matter has been discussed so often in this Court that we simply refer to Chicago, B. & Q. R. Co. v. McGuire, 219 U. S., 549, 567, 568; 55 L. Ed., 328, 338, 339; 31 Sup. Ct. Rep., 259, and the cases there cited to illustrate how much power is left in the states. See also Grenada Lumber Co. v. Mississippi, 217 U. S., 433, 442; 54 L. Ed., 826, 831; 30 Sup. Ct. Rep., 535;

Lemeiux v. Young, 211 U. S., 489, 496; 53 L. Ed., 295, 300; 29 Sup. Ct. Rep., 174; Otis v. Parker, 187 U. S., 606, 609; 47 L. Ed., 323, 327; 23 Sup. Ct. Rep., 168."

The Courts in the state cases cited above sustain Acts to prohibit discrimination and rebating as the proper method of preventing destruction of competition.

It will be noticed that counsel made the same argument in the Central Lumber case, *supra*, that is being made in the case at bar—to-wit, that the Act was passed for the benefit of the small dealer and that it tended to destroy competition, instead of preserving it.

Adversary counsel rely on the case of *Fairmount Creamery Company v. State of Minnesota*, 274 U. S., 1-11. In that case, however, there was no condition of the trade sought to be regulated that required any such legislation as that involved. On the contrary, this Court held that the Legislature directly interfered with the method of doing business which was wholly unobjectionable *with reference to that particular trade.*

The Court referred with approval to several of the cases we have herein cited, especially *Purity Extract Co. v. Lynch, infra*, and *Merrick v. Halsey, supra.*

After referring to these cases, the Court said:

> "But all those cases recognize the duty of the court to inquire into the real effect of any statute duly challenged because of interference with freedom of contract guaranteed by the Fourteenth Amendment, and to declare it invalid when without *substantial relation to some evil within the power of the state to suppress* and a clear infringement of private rights."

With reference to the specific Act and the facts with relation to the industry to be controlled, the Court says:

> "The real question comes to this: May the state, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way *heretofore regarded as both moral and ben-*

eficial to the public and not shown now to be accompanied by evil results as ordinary incidents?"

In the case at bar, however, the judicial history of this industry and the Standard Oil Company's connection with the industry for more than half a century shows an actual, continuous, present, and unrelenting purpose on the part of the Standard Oil Company and other large companies engaged in the industry to destroy competition and monopolize the trade by the very trade practice condemned in Section 8 of this Act.

The report of the United States Senate Committee, already referred to—the numerous decisions of this Court and of the Supreme Court of Tennessee—the recent litigation in the State of Tennessee, hereinbefore referred to—the Governor's message to the Legislature and the preamble to this Act, all establish the fact of the evil complained of and the necessity of such legislation as that provided in this section of the Act.

We have hereinbefore set out the report of the Congressional Committee recommending the passage of the Clayton Anti-Trust Act, the second section of which provides as follows:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price *between different purchasers of commodities,* which commodities are sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, *where the effect* of such discrimination may be to substantially lessen competition."

The committee's report shows that the evil practice of the Standard Oil Company in rebating and in discriminating in its prices was one of the things that made necessary this Federal legislation.

In other words, in the Fairmount Creamery case, the Act bore no reasonable relation to any actual evil existing in the

trade sought to be regulated; whereas the Act we are now dealing with bears a very essential relation to a long recognized evil that both the State and Federal governments have been attempting to regulate and control.

In the case of *Crescent Cotton Oil Company v. Mississippi*, 257 U. S., 129, this Court sustained the validity of an Act of the General Assembly of Mississippi prohibiting manufacturers of cotton seed oil or cotton seed meal from doing certain lines of local business, and especially from owning and operating cotton gins in the State of Mississippi. This Act was attacked by a manufacturer of cotton seed oil that owned and operated two cotton gins. It made the same insistence as that made here: that it was the owner of private property and that it had the right to own and use that property under the protection of the Fourteenth Amendment to the Constitution. It was insisted that it was impractical to purchase its cotton seed from other ginners or brokers, and that it was necessary to own its own gin in the proper operation of its business.

The Court said:

> "Where, as we have found in this case, a foreign corporation has no Federal right to continue to do business in a state, and where, as here, no contract right is involved, and there is no employment by the Federal Government, it is the settled law that a state may impose conditions, in its discretion, upon the right of such a corporation to do business within the state, even to the extent of excluding it altogether. Horn Silver Min. Co. v. New York, 143 U. S., 305; 36 L. Ed., 164; 4 Inter. Com. Rep., 57; 12 Sup. Ct. Rep., 402; Baltic Min. Co. v. Massachusetts, 231 U. S., 68, 83; 53 L. Ed., 127, 133; 34 Sup. Ct. Rep., 15, and cases cited. And in such case the inherent difference between corporations and natural persons is sufficient to sustain any classification making restrictions applicable to corporations only. Hammon Packing Co. v. Arkansas, 212 U. S., 322, 343, 344; 53 L. Ed., 530, 541, 542; 29 Sup. Ct. Rep., 370; Baltic Min. Co. v. Massachusetts, *supra*.

And see Ft. Smith Lumber Co. v. Arkansas, 251 U. S., 532, 533; 64 L. Ed., 396, 398; 40 Sup. Ct. Rep., 304; American Sugar Ref. Co. v. Louisiana, 179 U. S., 89; 45 L. Ed., 102; 21 Sup. Ct. Rep., 128; W. W. Cargill Co. v. Minnesota, 180 U. S., 452; 45 L. Ed., 619; 21 Sup. Ct. Rep., 423.

"This would be sufficient to dispose of this second contention, but we may add that the law assailed was enacted by the state in the exercise of its police power, to prevent a practice conceived to be promotive of monopoly, with its attendant evils. It is clearly settled that any classification adopted by a state in the exercise of this power which has a reasonable basis, and is therefore not arbitrary, will be sustained against an attack based upon the equal protection of the law clause of the Fourteenth Amendment, and also that every state of facts sufficient to sustain such classification which can be reasonably conceived of as having existed when the law was enacted will be assumed. Lindsley v. Natural Carbonic Gas Co., 220 U. S., 61; 55 L. Ed., 369; 31 Sup. Ct. Rep., 357; Ann. Cas., 1912C, 160, and cases cited; Rast v. Van Denman & L. Co., 240 U. S., 342; 60 L. Ed., 679; L. R. A., 1917A, 421; 36 Sup. Ct. Rep., 370; Ann. Cas., 1917B, 455."

In the case of Purity Extract Co. v. Lynch, 226 U. S., 197, the Court held an Act of the State of Mississippi valid, prohibiting the sale of non-intoxicating soft drinks. It could not be denied that the owner of these soft drinks had the right under the Constitution to own and sell this property. The state, on the other hand, in the exercise of its police power, had the right to prohibit and prevent the sale of intoxicating liquors. The General Assembly of the state in its wisdom concluded that the sale of certain non-intoxicating liquors could be used as a subterfuge to prevent the full operation of the prohibition against the sale of intoxicating liquors, and therefore, in order to aid in the enforcement of its prohibition against the liquor traffic, it sought also to prevent the sale of the harmless beverages

referred to, and the Court sustained this as a proper exercise of police power, and, among other things, said:

> "It is also well established that, when a state exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. Booth v. Illinois, 184 U. S., 425; 46 L. Ed., 623; 22 Sup. Ct. Rep., 425; Otis v. Parker, 187 U. S., 606; 47 L. Ed., 323; 23 Sup. Ct. Rep., 168; Ah Sin v. Wittman, 198 U. S., 500, 504; 49 L. Ed., 1142, 1144; 24 Sup. Ct. Rep., 756; New York, ex rel., Silz v. Hesterberg, 211 U. S., 31; 53 L. Ed., 75; 29 Sup. Ct. Rep., 10; Murphy v. California, 225 U. S., 623; 56 L. Ed., 1229; 32 Sup. Ct. Rep., 697. With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment had no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the Legislature—a notion foreign to our constitutional system."

And so in the case at bar. The General Assembly trying this Act, seeks to remedy the evils and dangers threatening the gasoline industry of this state, and in order to prevent the destruction of competition has prohibited (a) rebating and price cutting and (b) discrimination between purchasers in different sections of the state.

THE PROVISION WITH REFERENCE TO DIFFERENTIALS.

The following provision of Section 8 is valid:

> "And provided further, that dealers shall maintain proper differentials between wholesale and retail prices." (R., p. 18.)

This, it will be observed, follows immediately the provision in Section 8 against rebating and discrimination.

This is not a price-fixing provision.

As far as this provision is concerned, the dealer is perfectly free to fix any price he may desire. He may not, however, make his retail and wholesale prices the same.

One of the methods in use by the Standard Oil Company and other large dealers in Tennessee to destroy small competitors was the practice of selling without any differential between retail and wholesale prices. (R., p. 18.)

It is simply another form of price cutting used by these dealers in order to destroy competition.

This is shown not only by the condition of the trade in Tennessee, as hereinbefore set out, but by the opinions of this Court in numerous cases dealing with the conduct of this trade and the various Standard Oil Companies. It is also shown by the report of the Senate Committee and by the Congressional Committee with reference to the Clayton Anti-Trust Act.

Section 9 provides that the Attorney General of the state, or an assistant to be designated by him, shall assist in the enforcement of the Act and shall represent the company in all proceedings with reference thereto. (R., p. 22.)

Section 10 provides for a small annual tax on the dealers securing permits under the provision of the Act. (R., p. 22.)

Section 11 clearly defines the term "gasoline" within the meaning of the Act. (R., pp. 22, 23.)

Section 12 provides, as hereinbefore stated, that if any section or provision of the Act shall be held invalid, this

shall not affect the validity of other sections or provisions thereof. (R., p. 23.)

The foregoing severable provisions of the Act are valid and, without regard to the price-fixing provisions, should be sustained.

IN CONCLUSION.

Therefore, for the reasons stated, it is respectfully submitted:

1. That the Act of the General Assembly of the State of Tennessee, challenged and complained of in this cause, is a valid, proper, and constitutional exercise of the police power of the state, designed and intended to regulate, within the state, the gasoline industry affected with the public interest, and to prevent monopoly and extortion in the sale and distribution, within said state, of a commodity devoted to the public use, and affecting, directly and indirectly, all the people of Tennessee.

2. That even if the price-fixing provisions of said Act should be held to be invalid, nevertheless other severable and distinct provisions of said Act should be sustained and enforced, particularly the provisions relating (a) to the publication of prices by gasoline dealers and filing same with the Department of Finance and Taxation; (b) the issuance of permits to gasoline dealers; (c) prohibiting rebates; (d) prohibiting discrimination; (e) for the collection and publication of data by the Finance Commission with reference to prices and conditions in the industry; (f) providing pen-

alties for violation of the several provisions of the Act thus designated; and (g) providing for judicial review of the orders of the Commission.

Respectfully submitted,

L. D. SMITH,
Attorney General of Tennessee.

J. J. LYNCH,
H. N. LEECH,
CHARLES T. CATES, JR.,
Attorneys for Appellants.

APPENDIX.

CHAPTER 22 OF THE ACTS OF 1927.

SENATE BILL NO. 282.

(By McKnight, Wiggs and Miller.)

AN ACT to regulate the gasoline industry; to regulate the fixing and charging of prices of gasoline and prescribing a method for determining at what prices gasoline dealers may sell gasoline; to prohibit rebate and discriminati on; to create and establish a Division of the Department of Finance and Taxation to be known as the Division of Motors and Motor Fuels, fixing the duties of the Commissioner of Finance and Taxation and of the Superintendent of such Division with respect to the regulation of sale prices of gasoline; to provide for the issuance of permits to gasoline dealers under rules and regulations prescribed by the Division of Motors and Motor Fuels; to provide penalties for the violation of the Act; to levy and to collect an additional tax on gasoline dealers; and to authorize a judicial review of the orders of the Division of Motors and Motor Fuels.

SEC. 1. Whereas, Gasoline is now in general use as a motor fuel, in both public and private transportation, and is necessary in carrying on the commerce of the people of this State, and

Whereas, the business of selling and marketing gasoline has become demoralized because of the attempt on the part of some dealers to monopolize the business and destroy competition, and because of the unfair and improper practices in the trade, it has become necessary for the State to control and regulate the business of selling and marketing gasoline in order to prevent the destruction of competition and to prevent extortionate prices and to preserve both public and private commerce and transportation,

It is therefore hereby declared that the sale and marketing of gasoline in this State is impressed with public use,

Therefore, Be it enacted by the General Assembly of the State of Tennessee, That there is hereby established a Division of the Department of Finance and Taxation to be known as the Division of Motors and Motor Fuels, which said Division shall be in charge of a Superintendent to be

named and appointed as other Superintendents of Divisions of the Department of Finance and Taxation are provided by law.

SEC. 2. *Be it further enacted,* That it shall be the duty of the Commissioner of Finance and Taxation to require the Division of Motors and Motor Fuels, through the Superintendent and other employees of said Division, to make investigations and to collect and record data concerning the manufacture and sale of gasoline; the cost incident to the refining processes at the refineries to the dealers in Tennessee and elsewhere, freight rates, differentials in prices to the wholesale dealer and the retail dealer; the cost and expense incident to the sale of gasoline; the methods employed by manufacturers and dealers in the distribution of gasoline to consumers, and such other data and information as will or might be material in ascertaining and determining what prices would be fair and reasonable to be paid for gasoline by wholesale dealers, retail dealers and consumers. All such data and information shall be available for use to the Commissioner and the Division aforesaid in the regulation of prices at which gasoline may be sold in the State of Tennessee, and shall be available for the inspection and information of the public, and the said Commissioner is authorized, when deemed necessary, to make public by publication or otherwise the information secured hereunder. It shall be the duty of the Superintendent of the Division of Motors and Motor Fuels to issue permits to dealers, subject to the approval of the Commissioner of Finance and Taxation, authorizing the sale by wholesale or retail of gasoline in this State at prices fixed and determined as hereinafter provided, and to perform such other duties as may be prescribed by subsequent sections of this Act.

SEC. 3. *Be it further enacted,* That it shall be unlawful for any person, firm or corporation, to engage in the sale of gasoline in intra-state commerce in this State, either at wholesale or retail, without first having obtained a permit to do such business, signed by the Superintendent of the Division of Motors and Motor Fuels and approved by the Commissioner of Finance and Taxation, and no per-

mit shall be issued to any firm, person, or corporation to engage in the sale of gasoline in intra-state commerce unless and until such dealer shall make application therefor in accordance with the regulations of this Act, and in compliance with all the requirements and provisions hereof.

SEC. 4. *Be it further enacted,* That every person, firm, or corporation, desiring to engage in the sale of gasoline in intra-state commerce in this State, either at wholesale or retail, shall make application to the Superintendent of the Division of Motors and Motor Fuels therefor, and shall be set out in said application the following information, to-wit:

(a) Whether he proposes to do a wholesale or retail business, or both; and if a wholesale business the number and location of the different places at which he intends to operate; and if a retail business the number and location of the different service stations and pumps he intends to operate.

(b) If the applicant is an individual, give his name and address; if a partnership, the names and addresses of the members of the firm, the style of the firm and the place or places at which it is intended to do business; if a domestic corporation the location of its principal office and the names and addresses of its principal officers; if a foreign corporation the State of its incorporation, its principal place of business in the State where chartered, and its principal place of business in this State, as well as the names and addresses of its principal officers, and the name and address of its principal agent or agents in this State.

(c) The price or prices at which said dealer is at the time of the application selling gasoline at the different locations where he sells the same.

(d) The cost price of such gasoline to said dealer, including the refinery cost, transportation cost, taxes and inspection fees, the cost of distribution and such other costs and expense as may enter into the price at which it is proposed to sell such gasoline.

(e) The price or prices at which he proposes to sell gasoline as a wholesaler and as a retailer.

(f) Such other information as may be prescribed by the Superintendent.

SEC. 5. *Be it further enacted,* That it shall be the duty of the Superintendent of the Division of Motors and Motor Fuels to take into consideration all the information furnished as provided by the previous section, and if the price or prices at which said applicant proposes to sell gasoline does not exceed a reasonable profit to the dealer, after figuring the cost to the dealer, freight and expenses in marketing, and making a proper differential between the wholesale and retail prices, and the same is in the interest of the public, to issue to said applicant a permit authorizing him to sell gasoline in the State of Tennessee; provided, however, said permit must first be approved by the Commissioner of Finance and Taxation.

If, however, the price at which any applicant proposes to sell gasoline in Tennessee shall be by such Superintendent of Motors and Motor Fuels deemed unfair and unreasonable in view of the information, which by the previous sections is required to be taken into consideration, then it shall be his duty to fix and name a price or prices at which gasoline may be sold by the said applicant, and to notify said applicant thereof in writing stating the reasons for his action in this respect. In the event the applicant is dissatisfied with the action of the Superintendent it shall be his duty, before engaging in the sale of gasoline in this State, to notify the Commissioner of Finance and Taxation in writing, within ten days after receiving notice of the action of the Superintendent, of his dissatisfaction, and shall in said notice set forth specifically the objections which he has to the ruling of the Superintendent and the reasons upon which he relies for a review or correction of the action of the Superintendent, and shall demand of the Commissioner that he fix a time and place at which the Commissioner will hear proof, limited to the grounds and reasons assigned by the applicant for his dissatisfaction to the action of the Superintendent. Thereupon it shall be the duty of the Commissioner to fix a time and place and afford to the applicant an opportunity to be heard with respect to the grounds of his complaint by the introduction of proof, if desired. The time and place of such hearing will be named by the Commissioner, which shall not be more than

five days from the date of the filing of the complaint with him, notice of such time and place to be given to the applicant. It shall likewise be the duty of the Commissioner to give to the Governor and to the Attorney-General of the State, and to all other applicants for permits to whom permits have not been issued at the time, notice of the complaint of any applicant, and the time and place at which such said complaint will be heard. Any other person interested in the price of gasoline, either as a dealer or consumer, may likewise be heard upon the complaint of any applicant under such rules and regulations as the Commissioner may prescribe, provided, that said Commissioner may give notice by publication in daily newspapers published in at least two of the four larger cities of the State. After such hearing the Commissioner shall decide, upon taking into consideration the facts and information hereinbefore referred to, and such other facts as may be relevant, whether or not a permit will be issued to the applicant to sell gasoline at the price or prices, proposed, or if not at what price a permit will be issued, giving notice to the applicant thereof.

Any applicant aggrieved by the action of the Commissioner may file a petition for the purpose of having said action reviewed in any Chancery Court or Circuit Court of Davidson County, Tennessee, provided notice of his intention to file a petition for review has been served on the Commissioner five days in advance of filing. Upon receiving notice of the intention of an applicant to file a petition for review, as aforesaid, it shall then be the duty of the Commissioner to cause all of the proceedings had before him on the application to be reduced in writing, and verified by him as being correct, so that when such petition has been filed and notice thereof served upon him, (and the petitioner shall cause such notice to be served) the Commissioner shall, within five days, then file with the Clerk of the Court where said suit is brought a transcript of all the proceedings had before him, and which is sought to be reviewed, and said transcript duly verified shall constitute all the record, and shall be the basis of the action of the Court of Review; provided, that the court may, in its discretion, upon

good cause shown, allow either side to file additional proof. No order of the Commissioner shall be superseded by said Court before final hearing, unless after five days' notice to the Commissioner it shall appear to the Court at a regular hearing, or at Chambers upon proper motion, that irreparable injury will result to the petitioner on the continuance of said order, and that no irreparable injury will result from a dissolution or modification thereof; in such event the Court may, in its discretion, either supersede or modify said order in such manner and upon such conditions and terms as may appear to be proper.

SEC. 6. *Be it further enacted*, That it shall be unlawful for any person, firm or corporation, engaged in selling gasoline in Tennessee, at either wholesale or retail, to change his price or prices without applying for and obtaining the consent of the Superintendent of the Division of Motors and Motor Fuels, approved by the Commissioner of Finance and Taxation. Any dealer desiring to change his price shall file his application with the Commissioner at least five days before the proposed change in prices, and shall set out in his said application the reasons for said change, and shall show:

(a) That conditions exist, or have arisen justifying such changes and what such conditions are, which show that the new price to be charged is not unfair to the public and not unfair to other dealers.

In determining whether such change shall be permitted the same procedure shall be had as hereinbefore prescribed with respect to the issuance of the original permit, and the same remedies shall apply to any one aggrieved at the action of the Commissioner as is afforded to one aggrieved by the action of the Commissioner upon an original application, including the right of review to any Chancery or Circuit Court of Davidson County, Tennessee.

SEC. 7. *Be it further enacted*, That either the Attorney-General of the State, or any other person interested, whether as dealer or consumer, may file with the Superintendent of the Division of Motors and Motor Fuels objection to any price or prices being maintained by any dealer as herein defined, and may show in his petition setting up said ob-

jection that the price or prices are extortionate or unfair to the public, or to any other dealer, as above set out, and after due notice to such dealer, and after hearing proof in the manner and form hereinbefore prescribed for the procedure of the Commissioner of Finance and Taxation, and in such manner as will give both sides proper opportunity to be heard, the Commissioner shall, if the facts warrant such action, issue an order to the said dealer whose prices are complained of restraining him from selling at the price complained of, or the Commissioner may make in said order any such conditions or limitations as under the facts will do justice to said dealer and protect the public and legitimate competition, the Commissioner at all times taking into consideration those facts and elements hereinbefore set forth as constituting a fair and reasonable price in the interest of the public. Any other person aggrieved at the action of the Commissioner in this respect shall be entitled to the same right of objection and review by the Courts, and under the same procedure as is hereinbefore provided in the case of original applications for permits.

SEC. 8. *Be it further enacted*, That it shall be unlawful for any person, firm or corporation, engaged in intra-state wholesale or retail gasoline business in Tennessee to grant any rebate to any customer or purchaser of said gasoline from any dealer, or to sell to any such purchaser or customer at a price different from that filed with the Commissioner of Finance and Taxation, or to grant any concession or gratuity, directly or indirectly to any customer or purchaser for the purpose of inducing said purchaser or customer of said dealer to purchase, use or handle the gasoline of said dealer; and it shall be unlawful for any person, firm or corporation engaged in intra-state wholesale or retail sale of gasoline in Tennessee to discriminate against or in favor of any customer or purchaser of said dealer by selling at a different price to said purchasers in different localities in Tennessee, or to different purchasers in the same locality, provided the dealer may take into consideration the difference in freight rates to different localities, and provided further, that dealers shall maintain proper differentials between wholesale and retail prices as such differen-

tials may be fixed and determined by the Superintendent of the Division of Motors and Motor Fuels with the approval of the Commissioner of Finance and Taxation. And it shall also be unlawful for any person, firm or corporation to bring about an unreasonable, or unfair increase in the refinery prices of gasoline to dealers in Tennessee, or who shall aid or conspire, combine or confederate with others in aiding to bring about such unreasonable and unfair increase in such refinery price.

No firm, person or corporation who violates any of the provisions of this Section shall be entitled to a permit to engage in the wholesale or retail or intra-state sale of gasoline. The Governor, the Attorney-General of the State, or any person interested in the price of gasoline, whether dealer or consumer, may upon petition file with the Commissioner of Finance and Taxation complaint against any person, firm or corporation as being guilty of a violation of the provisions of this Section, and if such complaint be filed with the Commissioner, properly sworn to and verified, it shall be the duty of the Commissioner to give notice to the dealer whose conduct is complained of and afford a hearing upon notice to all persons concerned. If the dealer complained of is found to be guilty of the charges by the Commissioner, then it shall be his duty to refuse to issue or cancel his permit. Any investigation had by the Commissioner under the provisions of this Section shall be held and conducted in the same manner as hereinbefore provided for complaints at the action of the Commissioner upon original applications, and the same remedies shall be afforded to those aggrieved as are hereinbefore afforded to persons aggrieved by the action of the Commissioner with respect to original applications for permits.

SEC. 9. *Be it further enacted,* That the Attorney-General of the State, or some assistant Attorney-General designated by him for said duty, shall be the law officer of the Division of Motors and Motor Fuels and the Commissioner of Finance and Taxation and shall represent the public in all proceedings before the said Division or Department, and in all judicial proceedings growing out of the orders of said Department and Division.

SEC. 10. *Be it further enacted,* That before any person, firm or corporation shall obtain a permit to deal in gasoline, either at wholesale or retail, in this State, he shall pay a special permit tax which shall accompany the application for permit as follows:

(a) For each place so conducted for the wholesale marketing of gasoline $10.00 per annum.

(b) For each retail station or curb pump $1.00 per annum.

This tax shall be in addition to all other license, inspection or ad valorem taxes otherwise provided by law, and shall be kept as a special maintenance fund to aid in defraying the expenses of the Motors and Motor Fuel Division of the Department of Finance and Taxation.

SEC. 11. *Be it further enacted,* That the term "gasoline" as used in this Act means and includes:

(a) The volatile substance produced from petroleum, natural gas, oil shale or coal heretofore sold under the name of gasoline.

(b) Any volatile substance or product less than 112 Fahrenheit Flash Test when tested in a manner approved by the U. S. Bureau of Mines derived wholly or in part from petroleum, natural gas, oil shale or coal.

(c) Benzol and/or any other volatile substance used wholly or in combination with gasoline as a liquid fuel.

SEC. 12. *Be it further enacted,* That if any section or provision of this Act shall be held to be invalid this shall not affect the validity of other sections or provisions hereof.

SEC. 13. *Be it further enacted,* That this Act take effect from and after its passage, the public welfare requiring it.

Passed April 5, 1927.

HENRY H. HORTON,
Speaker of the Senate.

SELDEN MAIDEN,
Speaker of the House of Representatives.

Approved: April 8, 1927.

AUSTIN PEAY,
Governor.

FILED
SEP 21 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. [redacted] 65

ALBERT S. WILLIAMS, Commissioner of Finance of the State of Tennessee, L. D. SMITH, Attorney General of the State of Tennessee, and R. M. ATKINSON, District Attorney General,

APPELLANTS,

Against

THE TEXAS COMPANY,

APPELLEE.

On Appeal from the District Court of the United States for the Middle District of Tennessee.

Brief and Argument on Behalf of Appellants, Officials of the State of Tennessee.

L. D. SMITH,
Attorney General of Tennessee.

H. N. LEECH,
J. J. LYNCH,
CHARLES T. CATES, JR.,
Attorneys for Appellants.

McQUIDDY PRINTING CO., NASHVILLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 764

ALBERT S. WILLIAMS, Commissioner of Finance of the State of Tennessee, L. D. SMITH, Attorney General of the State of Tennessee, and R. M. ATKINSON, District Attorney General,

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McQUIDDY PRINTING CO., NASHVILLE

SUBJECT INDEX.

PAGE

I. TWO VITAL QUESTIONS DECIDED AGAINST THE STATE OF TENNESSEE BY THE DISTRICT COURT..... 1- 2

1. That the State of Tennessee is without power to regulate the price of gasoline sold within her borders, so as to allow dealers in gasoline to exact only reasonable prices therefor..... 1

2. That the State is without power to require a foreign corporation, as a condition of its doing business within the State, to furnish information in regard to the conduct of its business within the State 2

II. HISTORY OF THE CASE..... 2-21

1. Price war, rebates and discriminations in the gasoline industry in Tennessee..... 2- 3

2. Governor's message to the General Assembly recommending regulatory legislation 3- 4

3. Legislation complained of and held invalid by the District Court 4-5, 72-80

4. Original Injunction Bill filed challenging constitutionality of the Act..... 5- 6

5. Answer and motion to dismiss the bill..... 6-21

(1) Motion to dismiss upon the ground that the Act challenged is a valid, constitutional enactment of the State of Tennessee..... 6- 7

(2) Answer of defendants in Court below... 7-21

(a) The Standard Oil Company of Louisiana is, in effect, the same corporate interest as the Standard Oil Company of Kentucky which was ousted from doing business in the State of Tennessee by decree of Supreme Court of that State, affirmed by this Court..... 7-11

(b) Complainant has confederated with and aided and abetted the Standard Oil Company in monopolizing the gasoline industry in Tennessee 8-11

(c) The gasoline industry in Tennessee is affected with, and has been devoted to a public use and therefore, is subject to the regulatory police power of the State 11-21

J6012

PAGE

(d) The gasoline industry in Tennessee is monopolized and controlled by the principal dealers in said State, and is, therefore, subject to the regulatory police power of the State.... 11-21

6. Opinion and Decree of the District Court... 21-22

(1) That because of threatened prosecutions, complainant in the Court below was entitled to an injunction 21

(2) That the price-fixing provisions of the Act are invalid 21

(3) That the price-fixing provisions constituted the main purpose of the Act, and that therefore the whole Act was void..... 21-22

(4) And the Court so decreed..... 22

7. Substitution of Commissioner of Finance and Taxation, Williams, successor in office of F. S. Hall, one of the original defendants, and an appeal prayed and granted..... 22

III. ASSIGNMENTS OF ERROR 22-23

1. The District Court erred in holding that the Act of 1927 challenged by the bill was unconstitutional because said Act is a valid and proper exercise of the police power of the State, in its declared purpose to prevent monopoly and extortion in the prices of gasoline..... 22-23

2. That the Act is a valid and proper regulation of the gasoline industry in Tennessee, because said industry is affected with a public interest. 23

3. That the Act challenged is within the just and reserved police powers of the State to regulate and fix prices for the sale and distribution within the State, of gasoline,—a commodity affected with and devoted to the public interest.. 23

4. That even if the price-fixing provisions of the Act should be held invalid, the other regulatory provisions of the Act, intended to remedy the evils recited and set forth in the Act are severable from the body of the Act and should be sustained 23

5. No injunction should have been issued because the Oil Companies had a plain, adequate and complete remedy at law..... 23

PAGE

IV. PROPOSITIONS OF LAW..... 24-52

1. (a) The Standard Oil Company of Louisiana, in respect of their intra-state business in Tennessee, is, in fact and in law, the same interests represented by the Standard Oil Company of Kentucky, ousted from doing business in said State, and is not alwfully entitled to carry on its business therein or to complain of the Act of 1927..... 24

(b) The appellee herein is allied with and combined with the Standard Oil Company in monopolizing and controlling the sale of gasoline in Tennessee at unreasonable and unjust prices, and therefore not entitled to carry on its business therein and attack the Act of 1927..... 24

Cases sustaining said propositions of law..... 24

2. A foreign corporation is not entitled to carry on its business in any State except by complying with the conditions prescribed by such State... 25-26

Cases sustaining said proposition of law..... 25-26

3. Courts take cognizance of all matters of general knowledge, and may make use of its knowledge of facts with which they have become familiar by a series of preceding cases..... 27-28

Cases sustaining said proposition of law..... 27-28

4. Every presumption and reasonable intendment is in favor of the constitutionality of the Act 28-30

(a) Brown vs. Maryland, 12 Wheat., 436.... 28

(b) Sinking Fund Cases, 99 U. S., 718..... 28

(c) Arizona Copper Co. vs. Hammer, 250 U. S., 400 ..... 28- 9

(d) Knoxville vs. Knoxville Water Co., 212 U. S., 8 29

(e) Adkins vs. Children's Hospital, 261 U. S., 525, 544 29-30

Other cases sustaining said propositions of law 30

5. Upon the facts disclosed in the record the gasoline industry in Tennessee has been devoted to and is clothed with a public interest, and the

PAGE

legislation complained of was enacted in the proper exercise of the police power of the State 30

Cases sustaining said proposition of law..... 30

V. ARGUMENT IN SUPPORT OF THE FIFTH PROPOSITION OF LAW, SUPRA..... 30-51

1. To what does the police power of the State extend? It has never been limited by express definition 30-34

(a) Cooley on Constitutional Limitations... 31

(b) People vs. Budd, 117 N. Y., 1..... 31-32

(c) Tennessee cases supporting the doctrine that the police power extends to the safety, health, morals, comfort, and welfare of the people, and expands to meet new conditions 32

(d) Federal cases supporting the doctrine above stated 32-34

In re: Rahrer, 140 U. S., 554..... 32-33

Wolff vs. Industrial Court 262 U. S., 522..... 33-34

Rail & River Co. vs. Yappell, 236 U. S., 338.... 34

2. Facts relied upon showing that the gasoline industry is clothed with a public interest are not denied by appellee, complainant in the Court below 35

3. Summary of facts and conditions showing that the gasoline industry is a monopoly in Tennessee and has been devoted to, and is affected with a public interest..... 35

(1) Matters of common knowledge of which the Court takes cognizance..... 35-40

(a) Mennen Co. vs. Federal Trade Commission, Fed. Rep., 774, 778, 779, reviewing illegal practices of corporations, such as the Standard Oil Company and its subsidiaries, in mopolizing and controlling prices 35-36-37

(2) The judicial history of the petroleum industry showing, as portrayed by the decisions of the State and Federal Courts, an unrelenting and unswerving determination on the part of

PAGE

the Standard Oil Companies to monopolize and control the entire industry in this country..... 37-38

(3) Dealers in gasoline in Tennessee have, in fact, a monopoly of that business, and facts supporting this proposition 38

(4) Ouster from the State under the anti-Trust Acts enforced against the Standard Oil Company of Kentucky, did not and does not give relief to the people of Tennessee, hence the additional reason for controlling prices of gasoline—giving a fair price to the dealer, and a reasonable and fair price to the seller..... 38-39

(a) Report of Manufacturers' Committee of United States Senate to the effect that gasoline is essential to the life of industry and vital to the public,—that it is affected with a public interest and subject to regulations 39-40

4. The Tennessee Act challenged by the Standard Oil Company and other Oil Companies in Tennessee is sustained by the decisions of this Court as a valid exercise of the State's police power 40-51

(a) The case of Tyson vs. Banton, 264 U. S., 140, upon which the learned District Court predicated its holding, and the case of Fairmont Creamery Co. vs. Minnesota, 274 U. S., 1, and Ribnik vs. McBride, decided by this Court on May 28, 1928, relied upon by appellee, cited and distinguished from the facts and principle controlling in this case..... 41

(b) The principles announced and enforced in the Munn case (94 U. S., 113) and Wolff case (262 U. S., 522) predicated in a large measure upon the Allnut case (12 East, 527), sustains the Tennessee Act upon the grounds:

(1) The gasoline industry in Tennessee has been carried on and is being carried on in such a manner as makes it of utmost public consequence affecting the community 42

(2) Dealers in the gasoline industry without a grant or governmental franchise, have

PAGE

a virtual monopoly of the sale and distribution of gasoline in Tennessee..... 42-51

5. The Munn case is the guide-post..... 42-43

(a) Allnut vs. Inglis, 12 East, 527, upon which the Munn case is largely predicated 43-44

(b) The Wolff case,—its classifications of the businesses clothed with a public interest. 44-45

(c) The Van Dyke case (244 U. S., 39) following the Munn case, approvingly quotes:

"Property becomes clothed with a public interest when used in a manner to make it of public consequence and to affect the community at large"..... 46

(d) C. B. & Q. Ry. Co. vs. McGuire, 219 U. S., 549, holding when the Legislature has power to establish a regulation, it also has the power to prohibit contracts in derogation of such regulation 47

(e) Noble State Bank vs. Haskel, 219 U. S., 104, declaring the limits to which the Legislature may go in regulating private business 47

(f) The German Alliance Insurance Co. vs. Kansas, 233 U. S., 389, defining public uses 48- 9

6. Proposition of law as follows:

Even if the price-fixing features of the Act complained of are held to be invalid, nevertheless the other regulatory features of the Act are valid, and should be sustained, as insisted in the fourth assignment of error..... 51

(1) Opinion of District Court to the effect that the other regulatory features of the Act fall with the price-fixing provisions. 51-52

(2) Argument in support of fourth assignment of error 52-70

(a) The price-fixing provisions of the Act are but one of the remedies against the evils complained of as set forth in the bill, and it is manifest that the Legislature intended to assert its power to fully regu-

PAGE

late the gasoline industry by means and methods in addition to those included within the price-fixing provisions..... 52

(b) Some of the severable provisions of the Act analyzed, especially those relating to the collection of data and furnishing information 52-70

(c) Application of the principle announced in Standard Oil Company vs. State, 217 U. S., 817, and the anti-Trust Act of 1903 to the conditions sought to be remedied by the challenged Act 53-54

(d) The case of Weller vs. New York, 268 U. S., 319-322, construing the same statutes of New York involved in the Tyson case, supra, sustains the severable propositions of the Tennessee Act..... 55-59

(e) The cases of Hall vs. Geiger, 242 U. S., 538; Caldwell vs. Sioux Falls Co., 242 U. S., 558; and Merrick vs. Halsey, 242 U. S., 568, sustaining the Blue Sky Laws of Ohio, South Dakota and Michigan, sustains the principle and doctrine contended for in the Tennessee Act..... 59-61

7. The provisions of the Tennessee Act prohibiting rebating and discriminations are valid, and are sustained by the decisions of this Court.... 51-70

(1) Section of the Tennessee Act prohibiting rebating and discrimination 61

Sustained by the following decisions of this Court:

Standard Oil case, 221 U. S., 1; Missouri Standard Oil case, 224 U. S., 761; Nash. vs. United States, 259 U. S., 274,

(2) It was for the offense denounced by said Section of the Tennessee Act that the Standard Oil Company of Kentucky representing the same interest as does appellee, was ousted from Tennessee as hereinbefore shown,—the decree of ouster being affirmed by this Court..... 61-62

(a) Central Lumber Co. vs. South Dakota, 226 U. S., 157..... 62-64

PAGE

(b) Fairmont Creamery Co. vs. Minnesota, 274 U. S., 1-11, analyzed 64-65

(c) Crescent Cotton Oil Co. vs. Miss., 257 U. S., 129, analyzed and applied to this case 66-67

(d) Purity Extract Co. vs. Lynch, 226 U. S., 197, analyzed and applied to this case... 68-69

(e) Other severable provisions relating to differentials 69-70

CONCLUSION 71

APPENDIX,—Copy of Tennessee Act..... 72-80

INDEX OF CASES CITED.

	PAGE
Adkins vs. Children's Hospital, 261 U. S., 525, 544	29
Ah Sin vs. Wittman, 198 U. S., 500, 504	68
Allnut vs. Inglis, 12 East, 527, 539-42	30, 43
American Sugar Refining Co. vs. Louisiana, 179 U. S., 89	25, 67
Arizona Copper Co. vs. Hammer, 250 U. S., 400 (63 L. Ed., 1058)	28
Austin vs. State, 110 Tenn., 563, 566	27
Baltic Mining Co. vs. Massachusetts, 231 U. S., 68, 83	25, 67
Beal vs. Chase, 31 Mich., 490	25
Block vs. Hirsch, 256 U. S., 135	45
Booth vs. Illinois, 184 U. S., 425	68
Brown vs. Maryland, 12 Wheaton, 436	28
Brass vs. North Dakota, 153 U. S., 391	30
Brass vs. Stoeser, 153 U. S., 391	45
Brazee vs. Michigan, 241 U. S., 240	56
Budd vs. New York, 143 U. S., 517, affirming 117 N. Y., 1	30, 45
Caldwell vs. Sioux Co., 242 U. S., 558	25, 59
Cargill Co. vs. Minnesota, 180 U. S., 452	25, 67
Central Lumber Co. vs. South Dakota, 226 U. S., 157, 161	62
C. B. & Q. R. R. Co. vs. McGuire, 219 U. S., 549 (55 L. Ed., 328)	34, 47, 64
Crescent Oil Co. vs. Mississippi, 257 U. S., 129	25, 66
Dayton Coal, Iron, etc. Co. vs. Barton, 183 U. S., 23 (S. C., 103 Tenn., 604)	30, 32
Dillard & Coffin Co. vs. Richmond Oil Co., 140 Tenn., 298	25
Dorchy vs. Kansas, 264 U. S., 286	56
Fairmont Creamery Co. vs. Minnesota, 274 U. S., 1	41, 64
Fort Smith Lumber Co. vs. Arkansas, 251 U. S., 532	25, 67
German Alliance Insurance Co. vs. Lewis, 233 U. S., 389-91, 410, 411, 415-17	30, 34, 45, 48
Green vs. Frazier, 253 U. S., 233	30

PAGE
Grenada Lumber Co. vs. Mississippi, 217 U. S., 433 442 64
Hall vs. Geiger, 242 U. S., 539..... 25, 59
Hammond Packing Co. vs. Arkansas, 212 U. S., 332, 343, 344 ..... 25, 67
Hannibal R. R. Co. vs. Husen, 95 U. S., 465..... 32
Honolulu Rapid Transit & Land Co. vs. Hawaii, 211 U. S., 282 29
Horn Silver Mining Co. vs. New York, 143 U. S., 305 25, 67
In re Rahrer, 140 U. S., 554..... 32
Jamison vs. Independent Natural Gas Co., 127 Ind., 555 27
Knight vs. U. S. Land Association, 142 U. S., 161... 27
Knoxville Iron Co. vs. Harbison, 183 U. S., 13 (S. C., 103 Tenn., 421) 30, 32
Knoxville vs. Knoxville Water Co., 212 U. S., 8..... 29
Leeper vs. State, 103 Tenn., 500, 532..... 30, 32
Lemeiux vs. Young, 211 U. S., 489, 496..... 64
LePage Co. vs. Russia Cement Co., 51 Fed. Rep., 941 25
Lindsley vs. Natural Carbonic Gas Co., 220 U. S., 61 67
McGaskill vs. U. S., 216 U. S., 516..... 24
McLean vs. Arkansas, 211 U. S., 539..... 30, 34
Manufacturing Co. vs. Falls, 90 Tenn., 466..... 30
Mayor of New York vs. Miln, 11 Peters (U. S.), 139 32
Mennen Co. vs. Federal Trade Commission, 288 Fed. Rep., 774, 778, 779..... 35
Merrick vs. Halsey, 242 U. S., 569.....25, 59, 64
Middleton vs. Texas Power, etc. Co., 249 U. S., 152.. 30
Muller vs. Oregon, 208 U. S., 412..... 27
Munn vs. Illinois, 94 U. S., 113-154 .....30, 42, 45, 46
Murphy vs. California, 225 U. S., 623..... 68
Nash vs. U. S., 259 U. S., 273..... 62
New York, ex rel. Silz vs. Hesterburg, 211 U. S., 31. 68
Noble State Bank vs. Haskell, 219 U. S., 104..... 45, 47
Oklahoma Gin Co. vs. State, 252 U. S., 339..... 30
Oklahoma Natural Gas Co. vs. Oklahoma, 258 U. S., 234, 237, 239 30
Oklahoma Operating Co. vs. Love, 252 U. S., 331.... 30
Otis vs. Parker, 187 U. S., 606-9..... 64, 68
People vs. Budd, 117 N. Y., 1..... 31

PAGE

People of N. Y. vs. North River Sugar Refining Co., 121 N. Y., 582, 9 L. R. A., 33 24
Prentis vs. Southern Railroad Co., 211 U. S., 210 ... 29
Purity Extract Co. vs. Lynch, 226 U. S., 197 ..... 64, 68
Railroad vs. Bryne, 119 Tenn., 278, 291, 292 30
Rail & River Co. vs. Yappel, 236 U. S., 338 ..... 30, 34
Rast vs. Van Denman, 240 U. S., 342-358 67
Ribnik vs. McBride (U. S.), decided 5-28-28 41
Richardson vs. Young, 122 Tenn., 471, 522-24 59
Sallee vs. Dalton, 213 S. W., 762 59
Schollenberger vs. Pennsylvania, 171 U. S., 1 27
Schmidinger vs. Chicago, 226 U. S., 578, 57 L. Ed., 364 34
Shea vs. Mining Co., 55 Montana, 522 59
Sinking Fund Cases, 99 U. S., 718 28
Smith vs. State, 16 Pickle (100 Tenn.), 505 32
Sparrow vs. Strong, 3 Wallace, 97, 104 27
Spring Valley Water Co., vs. Schettler, 110 U. S., 347 45
Stafford vs. Wallace, 258 U. S., 495 30
Standard Oil Co. vs. State, 117 Tenn., 618 ..... 8, 37
Standard Oil Co. vs. Missouri, 224 U. S., 761 ..... 37, 62
Standard Oil Co. vs. State, 217 U. S., 817 .....9, 37, 39
Standard Oil Co. of N. J. vs. U. S., 221 U. S., 1 ...12, 37, 62
Standard Oil Co. vs. State, 107 Miss., 227 37
State vs. Edwards, 86 Mo., 102 44
State vs. Standard Oil Co., 173 Fed., 177 62
State vs. Fairmont Creamery Co., 153 Iowa, 702, 42 L. R. A. (N. S.), 821 63
State vs. Bridgman & R. Co., 117 Minn., 186 63
State vs. Drayton, 82 Neb., 254, 23 L. R. A. (N. S.), 1287 63
State, ex rel Young vs. Standard Oil Co., 111 Minn., 85 63
State vs. Trewhitt, 113 Tenn., 561, 572 59
State vs. Wilson, 101 Kansas, 789, 806 58
State vs. Howitt, 107 Kansas, 423 57
State, ex rel Watson vs. Standard Oil Co., 49 Ohio State, 137, 15 L. R. A., 156 ..... 24, 37
State vs. Standard Oil Co., 120 Tenn., 86 .....9, 37, 39, 62
State vs. Standard Oil Co., 218 Mo., 1 37

PAGE

State, ex rel. vs. Brewing Co., 104 Tenn., 715, 740.. 30
Stone vs. Mississippi, 101 U. S., 814..... 32
Terminal Taxicab Co. vs. District of Columbia, 241 U. S., 251, 254..... 44
Towles & Co. vs. Miles, 131 Tenn., 79..... 25
Tyson vs. Banton, 264 U. S., 140.....41, 55, 56
U. S. vs. Teschmaker, 22 Howard, 392..... 27
Van Dyke vs. Geary, 244 U. S., 39, 47..... 45, 46
Waters Pierce Oil Co. vs. Texas, 212 U. S., 86..... 37
Weller vs. New York, 268 U. S., 319, 322..... 55, 57
Williams vs. Fears, 179 U. S., 270, 276..... 25
Wolff Packing Co. vs. Court of Industrial Relations, 262 U. S., 522, 535, 536, 538-41.....30, 33, 44, 50, 58
Yeiser vs. Dysart, 267 U. S., 538..... 25

TEXT BOOKS CITED

Cook on Corporations, 6 Ed., Sec. 709..... 24
Cooley on Constitutional Limitations, p. 707..... 31
Morowitz on Private Corp., Sec. 227..... 24

STATUTES CITED

Public Acts of Tennessee for 1903, Ch. 140..... 53
Public Acts of Tennessee for 1927, Ch. 22..... 72

IN THE

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OCTOBER TERM, 1928

No. 764

ALBERT S. WILLIAMS, Commissioner of Finance of the State of Tennessee, L. D. SMITH, Attorney General of the State of Tennessee, and R. M. ATKINSON, District Attorney General,

APPELLANTS,

Against

THE TEXAS COMPANY,

APPELLEE.

On Appeal from the District Court of the United States for the Middle District of Tennessee.

Brief and Argument on Behalf of Appellants, Officials of the State of Tennessee.

BRIEF ON BEHALF OF APPELLANTS.

May It Please Your Honors:

There are a number of questions made on the record in this case, but the two vitally important to the people of Tennessee for decision by this Honorable Court are:

(1) Whether a state is without power so to regulate the price of gasoline sold by local dealers to her citizens as to allow such dealers to exact only reasonable prices therefor; and

(2) Whether a state is without power to require a foreign corporation, as a condition of its doing business within the state, to furnish information in respect of the conduct of its business and the sale price of its gasoline for the purpose of ascertaining a reasonable price for such gasoline, *and also as tending to disclose whether such dealer is guilty of rebates and discriminations denounced as unlawful and injurious by the state.*

These questions were decided against the State of Tennessee by the Honorable District Court, and, through her proper officials, she has appealed to this Honorable Court for relief.

HISTORY OF THIS CASE.

Prior to 1925, the Standard Oil Company of Louisiana had been doing business in Tennessee, including the purchase by the public of its gasoline, until it was selling wholesale and retail to the people of Tennessee approximately fifty per cent (50%), or more, of the gasoline used by them.

Other gasoline companies, some independent and some confederated with or allied to said Standard Oil Company of Louisiana, had come to do business in Tennessee—the appellee here being one of such companies confederated with or allied to it.

There was instituted in the latter part of 1925 a "price war" by said Standard Oil Company of Louisiana and the larger companies, designed and intending to crush competition by the smaller companies in the State of Tennessee—the appellee here being one of such companies allied with the said Standard Oil Company of Louisiana for such purpose.

This "price war" was carried on by the means and methods usually invoked by the Standard Oil Company of Louisiana to drive out and destroy competition—that is, by rebates, discriminations in prices, the lowering of prices in some localities, resulting in the destruction of competition therein, and raising prices in other localities to offset and recoup the difference in the prices where competition had been destroyed (R., pp. 48, 52), until the people of Tennes-

see were practically at the mercy of the said Standard Oil Company of Louisiana and those confederated with it.

To have ousted or sought to oust appellee from the state for the violation of the anti-trust law would not have resulted in relief, because, as will be hereinafter referred to, the ousted company would have been immediately succeeded by another company different in name, but owned by the same interests. All of this was well known to the Governor of Tennessee, who appealed to the appellee and the other larger companies in the interest of the people of Tennessee for a cessation of the practices indulged in to carry on the "price war" and for a reduction in the price of gasoline, which had increased tremendously as the result of the destruction of competition and the means used to accomplish such result.

Some of the larger dealers, finally including the appellee, lowered their prices (R., p. 48), but did not discontinue their practice of price cutting, rebates and concessions to favored customers; whereupon when the General Assembly of Tennessee convened in 1927, *the Governor submitted a message to said General Assembly.*

The said message of the Governor is, in substance, as alleged in the following language in paragraph "III" (R., p. 48):

> "The extortionate and unreasonable prices being charged at the time, and for many years prior thereto, and sustained by the unlawful practices hereinbefore set out, having for their purposes and in fact succeeded in preventing competition to any worth-while extent, and then only for brief periods of time in localities here and there throughout the state, had become so unbearable that the Governor in response to the public opinion of the state, in his message to the present General Assembly, recommended legislation to control the distribution and prices of gasoline. He recited that the people of the state had been victimized long enough in the excessive cost of gasoline; that the state regulated the cost of gas and electricity, a matter of far less importance than the regulation of the

cost and distribution of gasoline. The message stated that this commodity to all effects and purposes is now controlled by a monopoly; that there are numerous refiners and many distributors of gasoline in the state, but that a single company in reality made the market on gasoline; that sometimes there was competition in prices, but that was occasionally, and for the purpose of preventing and destroying competition, and such periods were always succeeded by higher prices."

In the same paragraph the Governor recommends the character of legislation as is embodied in the Act of the Legislature of Tennessee in 1927, being Senate Bill No. 282, the validity of which is attacked in this case, and appears as an exhibit to the bill of complaint. (R., pp. 13-20, herein pp. 72-80.)

LEGISLATION COMPLAINED OF.

The result of the conditions brought about by appellee herein and its allies was—all known to the people of Tennessee and their representatives—Chapter 22 of the Acts of the General Assembly of Tennessee of 1927, duly passed and approved by the Governor on April 8, 1927, by which the State of Tennessee sought to regulate the sale price of gasoline within her borders by providing agencies for the fixing of reasonable charges and prices therefor, by prohibiting rebates and other discriminations in respect of such charges, and by requiring dealers in gasoline to furnish certain information, in regard to their business, considered necessary or helpful in the fixing of reasonable prices or in discovering and preventing unlawful rebates, combinations, or discriminations in business, enabling such dealers to extort from purchasers unfair, unreasonable, and unequal prices for said commodity devoted to and impressed with a public use.

R., pp. 13-20, pp. 72-80 herein.

The preamble of said Act, as set forth in its first section, is as follows:

"Whereas, gasoline is now in general use as a motor fuel, in both public and private transportation, and is

necessary in carrying on the commerce of the people of this state; and

"Whereas, the business of selling and marketing gasoline has become demoralized because of the attempt on the part of some dealers to monopolize the business and destroy competition, and because of the unfair and improper practices in the trade, it has become necessary for the state to control and regulate the business of selling and marketing gasoline in order to prevent the destruction of competition and to prevent extortionate prices and to preserve both public and private commerce and transportation:

"It is therefore hereby declared that the sale and marketing of gasoline in this state is impressed with public use."

BILL FILED.

On April 9, 1927, the day following the passage of said Act, and before any of its provisions could have been enforced, the appellee, The Texas Company, a corporation organized under the laws of the State of Texas, as plaintiff, filed its bill in the District Court of the United States for the Middle District of Tennessee, alleging, in substance, among other things, that said Act was void for the alleged reason that it interferes with appellee's freedom to contract, and that, in attempting to fix or control the prices for the sale of appellee's gasoline, offends against the due process clause of the Fourteenth Amendment to the Federal Constitution.

R., pp. 2-13.

By an order entered in this case September 2, 1927, The Texas Company of Delaware, having purchased all the assets and interests of every character of The Texas Company, the original plaintiff, was substituted as the party in interest as plaintiff. This was by agreement and in no way affects the case as therein shown. (R., pp. 102-104.)

The Act is also challenged upon the grounds that it confers legislative authority upon the courts and interferes with interstate commerce; but inasmuch as the Honorable

District Court did not pass upon these questions—certainly did not sustain the appellee's insistence thereon—it is not deemed necessary to further refer thereto.

It is to be noted that there was no charge in the bill to the effect that it was the intention of the state, through the agencies named in the bill, to require appellee to sell its gasoline at an unreasonable price or at a price that would not yield a fair and just return to appellee.

An injunction was prayed (R., p. 12), inhibiting appellants, officers of the state by and through whom the provisions of said Act is to be administered, from enforcing the terms and provisions thereof.

On the same day—to-wit, April 9, 1927—a restraining order was issued.

R., p. 25.

ANSWER AND MOTION TO DISMISS BILL.

On April 30, 1927, the appellants, defendants to the original bill, filed their answer (R., pp. 28-56), and incorporated therein (R., pp. 26-28) a motion to dismiss the bill upon, in substance, the following grounds:

(1) The allegations of the bill showed no grounds for equitable relief.

(2) That to the extent said bill is predicated upon claimed interference with plaintiff's alleged contract rights, plaintiffs wholly failed to aver and set out any contract existing between it and any firm, person, or corporation which would be unlawfully affected by said Act within the meaning of the provisions of the State or Federal Constitutions relied upon in said bill.

(3) That plaintiff is a foreign corporation and is entitled to carry on its intra-state business in Tennessee only under such conditions as said state may deem proper to impose upon it, and said Act passed within the just powers of said state is a valid enactment, prescribing the terms and conditions upon which plaintiff may carry on and operate its intra-state business; and if plaintiff does not desire to comply with said Act, it may withdraw or discontinue such business without incurring any penalty whatsoever.

(4) That said Act is a valid enactment within the sovereign police powers of said State of Tennessee.

(5) That upon the facts averred in the bill, and other facts of general and common knowledge, of which the court will take notice, gasoline, by the acts and doings of plaintiff, has been devoted to a public use and is affected with a public interest, and is therefore subject to regulation by the State of Tennessee.

(6) That it is within the power of the state to prohibit concessions, rebates, gratuities, and other practices, the necessary result of which is to destroy fair and reasonable competition and bring about unjust discrimination between purchasers and users of gasoline.

(7) That the officers of the state, charged with the enforcement of said Act, have taken no action with the view of determining the regulations or fixing the prices of gasoline, and until such action shall be taken and shown to be unreasonable in the sense of the law, there is no ground of equity jurisdiction; and further that the bill shows that plaintiff has not sought to avail itself of the remedies provided by the bill, fully adequate to protect every right of plaintiff.

(8) That no case is made by the bill showing any violation of the property rights of plaintiff.

(9) The Court must assume that the conditions of marketing and selling of gasoline in Tennessee at the time said Act was passed were and are as denounced in said Act, and before the Court can entertain jurisdiction of this cause the plaintiff must allege in the statement of its grievances facts that it was not engaged in the practices having the effect condemned in said Act, and particularly the first section thereof, which was not done.

R., pp. 26, 27.

ANSWER (R., pp. 28-58).

"The defendants deny that the plaintiff has continuously for several years been qualified under the law of the State of Tennessee to be doing business in the state, because of the connection of the plaintiff with

the Standard Oil Company, hereinafter referred to, and by reason of the conduct of the Standard Oil Company, to be stated hereinafter, in which the plaintiff has been connected and has coöperated with the said Standard Oil Company prior to the enactment of the said Act for a long period of time, and in which acts and conduct, in violation of the law of the state, affecting the business of marketing and selling oil and gasoline in Tennessee, it was connected with and participated in at the time of the passage of said Act, and at the time it filed this bill."

R., pp. 28-29.

The facts averred to support this special plea or defense denying plaintiff, is, or has been, for several years prior to and up to the passage of the Act here in question, qualified to do business in Tennessee under the law of this state, are, in brief, as follows:

That during and prior to 1906, the Standard Oil Company of Kentucky—one of the group of Standard Oil corporations—had been doing business in Tennessee, and, along with certain of its representatives and agents, was indicted in 1905 for violating the Tennessee "anti-trust law" in that it had entered into a conspiracy for lessening and destroying free competition in the sale of coal oil in Tennessee, with the result that said corporation and its representatives—co-conspirators—were convicted and fined five thousand dollars ($5,000.00), and one of its representatives was fined $3,000.00; but upon appeal, while the judgment against said representatives was affirmed, it was held by the Supreme Court of Tennessee that the remedy against the offending corporation was not by fine, but by a proceeding to oust it from doing business in the state, with the result that the judgment imposing the fine was reversed. This case is officially reported under the name and style of *Standard Oil Company, et al., vs. The State*, 117 Tennessee, pp. 618 to 679, inclusive.

Thereupon, the State of Tennessee, on the relation of her Attorney General, filed a bill in one of the chancery courts

of said state, charging, in substance, that the Standard Oil Company of Kentucky had been guilty of conspiracies and agreements violative of the Tennessee anti-trust law, and seeking a decree cancelling its permit to do business in the state, and that it be ousted and enjoined from further carrying on its intra-state business in Tennessee.

To said bill said corporation made defense, but upon the proof adduced at the trial the Chancery Court granted the relief sought and perpetually enjoined said Standard Oil Company of Kentucky from doing business in Tennessee.

R., p. 30.

Upon appeal by said corporation from the Chancellor's decree, it was affirmed by the Supreme Court of Tennessee on April 11, 1908, and the opinion of the Court directing the affirmance of the decree is reported in 120 Tenn., pp. 86 to 178, inclusive.

R., pp. 30, 31-57, 58.

Said Standard Oil Company sought and secured a writ of error from this Court to the Supreme Court of Tennessee for the purpose of reviewing the decree of the latter Court, and in due course the case came for trial in this Court on or about April 20, 1910; and on May 2, 1910, this Court affirmed the decree of the Supreme Court of Tennessee and that of the Chancellor, hereinbefore referred to.

The opinion of this Court, officially reported, is to be found in 217 U. S., pp. 817, *et seq.*

R., pp. 31, 57-60.

After the Supreme Court of Tennessee had affirmed the decree of the Chancellor, ousting said Standard Oil Company of Kentucky from doing business in Tennessee and enjoining it from doing further intra-state business in said state, and after said Oil Company had secured a writ of error from this Court to said Supreme Court of Tennessee, as hereinbefore shown, the Standard Oil Company of Louisiana was granted a charter from the State of Louisiana; but it made no application to the authorities for permission to do business in the State of Tennessee until *May 6*, 1910—*only four days* after this Court had, on May 2,

1910, affirmed the ouster decree against the Standard Oil Company of Kentucky.

R., p. 32.

That both the Standard Oil Company of Kentucky and the Standard Oil Company of Louisiana were and are but dummy corporations, owned, controlled, and dominated by the Standard Oil Company of New Jersey, which latter corporation practically dominates and controls the entire gasoline industry in the United States.

R., p. 32.

That after the affirmance by this Court of the ouster decree of the Supreme Court of Tennessee, the Standard Oil Company of New Jersey, theretofore doing business in Tennessee through its dummy corporation, Standard Oil Company of Kentucky, continued to do business in said state by the simple subterfuge of filing with the Secretary of State of Tennessee a copy of the charter of the Standard Oil Company of Louisiana and changing the name in Tennessee from Standard Oil Company of Kentucky to Standard Oil Company of Louisiana.

That there was no change in the management of the business, which was not only dominated and controlled by the same owner—to-wit, Standard Oil Company of New Jersey—but retained the same management in Tennessee, same officials, same employees, using the same property and paraphernalia of trade—except upon the tank wagons, stations, and stationery the name "Kentucky" was stricken out and the name "Louisiana" substituted—so that the corporate or business name appeared to the public as Standard Oil Company of Louisiana.

That the officials of the State of Tennessee did not know at the time the copy of the charter of the Standard Oil Company of Louisiana was filed that it was but a dummy corporation, owned and controlled by the Standard Oil Company of New Jersey, which was also the owner of the Standard Oil Company of Kentucky, which had been ousted from the state, and did not know that the same "managers, agents, servants, and attorneys" of the Standard Oil Company of Kentucky, who had been enjoined from doing busi-

ness in Tennessee, were continuing to do and carry on the same business under the fraudulent name and guise of the Standard Oil Company of Louisiana, and that the facts in reference to said fraud and subterfuge were but recently discovered.

R., pp. 32, 33.

Therefore it was averred and charged that said Standard Oil Company of Louisiana, being but a dummy corporation of the Standard Oil Company of New Jersey and the reflection of its dummy Standard Oil Company of Kentucky, was fraudulently substituted by the common owner, Standard Oil Company of New Jersey, into the oil business in Tennessee, from which the said Kentucky corporation had been ousted, and that said Standard Oil Company of Louisiana had never legally and properly complied with the laws of Tennessee, and that it came fraudulently into the State of Tennessee, and is now in contempt of the decree and injunction of the Supreme Court of Tennessee and the Chancery Court of Sumner County.

R., pp. 33, 34.

For the reasons hereinbefore and hereafter to be stated, appellants aver that the appellee, alleged to be in alliance and confederation with the Standard Oil Company or Louisiana or the Standard Oil Group, for many years prior to the passage of this Act, and at the time of its passage, for exacting extortionate, unjust and unreasonable prices on sales of gasoline in Tennessee, has no right to invoke the jurisdiction of a court of equity upon the grounds set forth in plaintiff's (now appellee's) bill filed in this case.

PARAGRAPH "II" ANSWER.

The answer in this paragraph sets forth a brief history of the development of the petroleum industry in the United States for the purpose of showing the causes that made it expedient and proper for the Legislature of Tennessee to enact the Act of 1927 to protect the people of Tennessee from being compelled to pay unreasonable and extortionate prices for gasoline—alleging that such unreasonable and

extortionate prices had existed for many years prior thereto in practically all the states. The history of this industry is said to be practically the history of the Standard Oil Company, and there is a recitation of the fact of the organization of the Standard Oil Company in 1870, the conveyance of all the stock therein on April 8, 1879, and that of other companies, to three trustees, the making of a trust agreement on January 2, 1882, by the parties named and other associates as the organizers of the said company, and the terms of said trust; the fact of said company being declared illegal March 2, 1892, by the Supreme Court of Ohio, and after this, to meet the situation resulting from that decision, the amending of the charter of the Standard Oil Company of New Jersey, increasing its capital stock from $10,000,000.00 to $110,000,000.00, and the transfer of all the stock of the said Standard Oil Company and the many subsidiaries it had acquired to this Company, by the issuing of stock certificates in all said companies of the Standard Oil group, and the management of the affairs of this combination thereafter by the Board of Directors of this Standard Oil Company of New Jersey, "who were the same men who had operated under the trust agreement mentioned."

It is further set out that this combination thus effected by such taking over of the Standard Oil Company of Ohio Court of the United States in May, 1911 (221 U. S., p. 1), and in violation of the Sherman Anti-Trust Act, in a bill filed against the Standard Oil Company of New Jersey and seventy other subsidiaries, including the Standard Oil Company of Kentucky, the Standard Oil Company of California, the Standard Oil Company of Indiana, the Standard Oil Company of Nebraska, the Standard Oil Company of New York, the Standard Oil Company of Ohio and the Waters-Pierce Oil Company. (Rec., pp. 35, 36.)

The answer, in paragraph "II," sets out in substance the facts upon which the decree of this Court (221 U. S.) granting the relief sought was predicated, in these words:

> "That both said Standard Oil Trust from 1882 to 1899, and the Standard Oil Company of New Jersey since 1899, had monopolized and restrained commerce in petroleum and its products. The particular prac-

tices, unlawful agreements and combinations with alleged independent concerns, are set forth and referred to in the opinion of the Court; and without attempting to elaborate, or set forth in detail, all of the unlawful practices indulged in by said Standard Oil Companies, the following outstanding facts are referred to, to-wit: Rebates, preferences and other discriminatory practices in favor of combinations with the railroad companies; restraint and monopolization by contract with pipe lines, and unfair practices against pipe lines; contracts with competitors in restraint of trade, unfair methods of competition, such as local price cutting at points where necessary to suppress competition; espionage of the business of competitors, the incorporation and operation of bogus independent companies, and payment of rebates on oil with intent to stifle and prevent competition; the *division of the United States into Districts*, and the limiting of the operation of subsidiary corporations as to such districts so that competition in the sale of petroleum products between such corporations were entirely eliminated and destroyed." (Rec., pp. 36, 37.)

Then, in support of the validity of the enactment here in question, the answer, immediately following the quotation just made from the opinion, reads thus:

"The defendants charge that practically all of the said unfair practices and methods for controlling absolutely the selling price of gasoline (and as for that matter other petroleum products not referred to in the Act here challenged) existed in Tennessee and all other States, and are and have been practiced by the different corporations, agents, etc., owned and controlled by the Standard Oil Companies, grouped as hereinafter stated, and such methods of controlling the prices have all the time been and are still being used to exact unreasonable and extortionate prices from the public using and having to purchase gasoline.

"Defendants state that the practices in favor of combination with railroad companies, above mentioned,

have perhaps been abandoned because of the laws of the United States and the different States passed on that subject, but the other methods of controlling absolutely the price, and thereby securing the power to dominate the oil industry, and sale of gasoline and other oil products, have been resorted to and are pursued by the Standard Oil Companies; and the plaintiff, The Texas Company, in Tennessee, prior and up to the enactment of the Act herein questioned, linked with, and acting in concert with the said Standard Oil Companies is exercising the power to charge and exact, and, in fact, exacting by the said Standard Oil Companies and the plaintiff unreasonable and extortionate prices for gasoline sold in Tennessee; and such extortionate and unreasonable prices are now being exacted and paid by the public in Tennessee, and the plaintiff is insisting upon the right to do so in challenging the validity of this Act."

Rec., p. 37.

It is alleged that the distribution of stock by the Parent Company (the Standard Oil Company of New Jersey) ordered by decree of the Court, "has never been complied with, and the evils condemned in the opinion of the Court in that cause have never been remedied nor abandoned." (Rec., p. 40.)

On pages 40-46 the bill alleges an investigation made by the Senate of the United States in 1923 of complaints with reference to the conduct of the large petroleum corporations, particularly the Standard Oil group companies and the findings of said Committee. It is alleged that this Committee reported, among other things:

"The dominating fact in the oil industry today, is its complete control by the Standard Companies. Any discussion of the subject which does not frankly recognize this control can only be misleading. Standard Oil today fixes the price which the producer of crude oil receives at the well, the price which the refiner receives for his gasoline and kerosene, as well as the retail price paid by the consumer. The Standard Oil Group divides

among the members of that group all the territory of the United States, and, with slight exceptions to be presently noticed, avoids all competition with other members of the group in the business of retailing gasoline and kerosene. Not only this, but two of the leading Standard Companies—New Jersey and New York —divide the world between themselves in retail marketing operations, and each carefully abstains from entering the territory of the other, while both refrain from competing with the Anglo-American Oil Company (Ltd.)."

It is alleged that:

"Through the Standard control of the pipe lines connecting the producing centers of the West with the consuming centers of the East and Middle West, not only is the price fixed according to the will of the Standard Group which any other interest must pay for the transportation of petroleum, but members of the group really determine whether any concern outside their group shall have petroleum transported at any price."
Rec., pp. 40, 41.

This report further says:

"The controlling factor in fixing the retail price of gasoline and other petroleum products is the dominance by the Standard Oil Companies of the retail market for these products throughout the United States, and particularly of gasoline and kerosene. Just as the Standard Companies fix the price which the producer must accept at the well for his crude oil, as do they fix the price which the consuming public has to pay at retail for gasoline, and to a large extent for kerosene. The great Standard Oil marketing companies, by confining their operations to a single fixed territory, are able to easily control the retail price of gasoline and kerosene in their respective territories."

"The companies of the Standard group co-operate with each other where such co-operation seems desira-

ble or necessary in order to meet the competition of independents."

The answer further sets out that as a result of this investigation by the Senate Committee, the Attorney-General of the United States, on the 25th of June, 1924, filed a suit against the Standard Oil Group in equity, at Chicago, mentioning the Standard Oil Company of Kentucky, that of California, that of Kansas, that of Ohio, that of Louisiana, and the appellant here, The Texas Company, and numerous other subsidiary companies.

The answer alleges that:

> "In said suit it was charged by the United States that said defendants, including plaintiff herein, were in an unlawful combination to dominate and control the manufacture and marketing of gasoline in violation of the laws of the United States." (Rec., pp. 42, 43.)

A supplemental bill was filed by the present Attorney-General in this case.

There are two classes of defendants alleged to be proceeded against in this suit, primary and secondary defendants. The primary defendants are The Texas Company, the appellee here, the Standard Oil Company of New Jersey, that of Indiana, the Standard Development Company and Gasoline Product Company. These primary defendants have certain patent rights relating to what is termed "the cracking process" in the production and manufacture of gasoline. It is said that by a system of cross arrangements, secondary defendants enter into agreements with one or more primary defendants, the effect of which is to control absolutely the gasoline industry and the prices to be paid therefor by the retailer. It is alleged:

> "Said agreements provided for the payment of heavy royalties ranging from a half of a cent to a cent and a quarter per gallon on gasoline produced by the cracking process for domestic consumption.
>
> "These charges, included by defendants as a part of their cost of manufacture, have had the effect to burden

and restrain interstate and foreign commerce in the above mentioned commodities by increasing the price thereof. In addition, numerous, onerous and oppressive covenants and conditions are included in said agreements which directly impede and restrain such trade and commerce by restricting the production of such commodities and by securing to certain of said defendants, more especially the Standard Oil Company of Indiana, a virtual monopoly of the trade and commerce therein in particular territories. Said primary agreements not only purport to convey manufacturing rights but also authorize the respective licensees to grant sub-licenses thereunder containing like onerous restrictions and provisions." (Rec., pp. 44, 45.)

As to the said licenses, the said bill in equity filed by the Attorney-General of the United States thus describes their distinctive features and effect on the price to be paid on the trade and prices of gasoline:

"(a) A combination among the different Standard companies setting out the territory in which each may manufacture and sell gasoline.

"(b) The dominion and control of all so-called independent refineries, in that these so-called independent refineries are restricted in the amount of gasoline they are allowed to manufacture. They are restricted in the territory in which they are allowed to operate and sell, and they are required to pay huge royalties to the Standard Companies for the privilege of manufacturing gasoline.

"(c) The result is that the Standard Companies dominate and control the production and manufacture of gasoline, and there is really no such thing as an independent refinery."

Rec., p. 45.

"It is charged that all of the Standard Oil Companies made defendants, soon after the dissolution of the Standard Oil Trust under the decree of the Supreme Court in 1911, entered into a scheme for dominating

and controlling the entire production of gasoline by means of contracts among themselves and with refiners, which contracts are called licenses."

Rec., p. 46.

The answer charges upon information and belief that the foregoing facts set forth in the said Senate Report and in the Original Bill and amendment thereto, filed on the 24th day of June, 1924, by the Attorney-General of the United States:

> "Show that the plaintiff is now and has been for many years a party to the undertakings and agreements entered into, and has in every sense carried them out for the absolute control of the sales prices of gasoline and other oil products in the State of Tennessee, and that it is co-operating with the Standard Oil Companies hereinbefore mentioned, and has been for a period of many years, in exacting unreasonable and extortionate prices for gasoline sold to the public in the State of Tennessee, by the unfair and illegal methods hereinbefore stated and charged against the said Standard Oil Companies in the marketing and sale of gasoline in said State of Tennessee. The Standard Oil Company of New Jersey, in truth and in fact, since the dissolution of the Standard Oil Trust by the Supreme Court of the United States, has dominated and controlled the entire industry of the United States and the prices at which all petroleum products, including gasoline, have been sold from time to time, and still does by a division of the territory of the United States hereinbefore set out as a fact and declared to be a fact by the Supreme Court of the United States."
>
> Rec., pp. 46, 47.

Further, as to the use made of such licenses and effect thereof in creating a virtual monopoly, and in effectually securing the maintenance of extortionate and unreasonable prices on gasoline to be paid by the public, the answer makes this allegation of fact:

"Numerous other manufacturers of gasoline and petroleum products, finding it necessary to employ the cracking process in order to compete with their rivals, and fearing to incur the hostility of the primary defendants so banded together by employing such process without their license, have accepted from such primary defendants licenses under the patents and asserted rights which have been pooled as aforesaid, in and by which they have agreed to pay to such primary defendants huge royalties as aforesaid, and have submitted to the numerous onerous and oppressive covenants and conditions hereinabove mentioned. Each manufacturer receiving such a license has become a party to the unlawful combination and monopoly, has estopped itself from hereafter questioning the validity of the patents under which it is licensed, and in a majority of instances, such licenses have reciprocally agreed to license the primary defendants under any patents relating to the cracking art which they have or may obtain in the future."

Rec., p. 45.

On the subject of the trade of selling and marketing of gasoline in Tennessee, being subject to the exercise of the power by the Act of 1927, the validity of which is attacked in this suit, the defendants charge that said Act is a proper and valid Act under the police power of the State, because:

"The business of selling and marketing gasoline in Tennessee has for many years been devoted to the interest of the public, to the use of the public, and the property used in such business likewise was devoted because it is a mere instrument of the business itself. The business by its circumstances and nature has arisen from private to public concern, and is therefore subject to the governmental control exercised by the General Assembly of this State in the Act here challenged. The liberty of contract guaranteed by the Constitution of Tennessee and the United States is no more involved in the method of price regulation authorized by this Act than in any other proper forms of regulation of

business and property affected by a public use, and the business of the plaintiff, and the property employed in the carrying on of its business is therefore subject to the governmental power of this State exercised in said Act.

"The plaintiff, and other dealers, in selling and marketing gasoline in this State is now, was at the time of the passage of said Act, and for many years prior thereto devoting its business and property connected therewith to the use of the public. The very nature of the business is such that the public has an interest therein as long as it is carried on, and the legislative power of the State can regulate it as the Legislature of Tennessee has done in this instance. The character of it tends to a common charge or price that must be paid by the public if the commerce, economic and social interests of the State are to be served."

Rec., p. 52.

The answer further alleges that gasoline has become a necessity in the transportation of commerce, on the farm and in all the economic and other social activities of life; that it is indispensable in building the roads of the State in practically all of the State municipalities, in maintaining and operating fire departments and in practically all the ninety-five counties of the State in running successfully the rural schools, in transporting school children by motor-driven vehicles, and its use for private and family automobiles, etc.

It sets out that the sales of gasoline in 1924 amounted to more than one hundred and ten million gallons, and in 1926 to more than one hundred and twenty-nine million gallons; that there are in the State two hundred and eighty thousand motor driven vehicles, consisting of automobiles, trucks, etc., in operation, and that gasoline is an absolute necessity for their use, and that in addition to said motor driven vehicles thousands of farm tractors, stationary gasoline engines, road making machinery and other kinds of machinery, to operate which gasoline has become necessary and indispensable. It sets out other details as to the universal use of gasoline in carrying on commerce of the State, etc.

It is alleged that the Standard Oil Group, composed of the Standard Oil Company of New Jersey and the other allied Standard Oil Companies hereinbefore mentioned in the bill, are absolutely dominating the entire oil industry, including the manufacture, transportation and marketing of gasoline in the State, and that the plaintiff (the appellee here) is dominated and controlled by the Standard Oil Group in maintaining the power to control the industry and sale of gasoline, and the actual control of the marketing and sale of it in Tennessee, and has been so aiding said group in controlling the refining and selling of gasoline from the production of crude oil at the well until it is placed on the market and sold to the consumers thereof in the State of Tennessee at extortionate, extravagant and unreasonable prices, and that it is the policy of said group to maintain such domination and control and maintenance of such prices as it may see fit to charge a consuming public in Tennessee.

It is alleged that the plaintiff (appellee here) ever since the date of its alleged domestication in Tennessee, by agreement and understanding with said Standard Oil Group, and by in fact acting in concert with the said group, has been and is a party to the policy of said group and absolutely control the selling price of gasoline to the public in Tennessee, and in maintaining its power and practice to sell gasoline to the public at extortionate and unreasonable prices.

Rec., pp. 54, 55.

OPINION OF COURT.

The application of plaintiff for injunction came on for hearing before three judges in the District Court, upon the entire record, to-wit: the bill and exhibits thereto, and the motion of defendants to dismiss and their answer, with exhibits thereto, and their answer to the amendment to the original bill. And thereupon, on August 20, 1927, the opinion of the Court was filed, holding in substance:

(1) That because of the threatened prosecutions alleged in the bill, plaintiff was entitled to an injunction.

(2) That the price-fixing provisions of the Act of 1927 were in violation of the due process clause to the Fourteenth Amendment to the Federal Constitution.

(3) That, notwithstanding the provisions of Section 12 of the Act—"that if any section or provision of this Act shall be held to be invalid, this shall not affect the validity of other sections or provisions hereof" (R., p. 20, p. 80 herein)—the price-fixing provision constituted the main purpose of the Act, and that, as it seemed to the District Court, "it is inconceivable that except for that purpose the legislation would have been enacted," and therefore the entire Act was void.

R., pp. 109-110.

A decree was entered in accordance with the opinion of the Court.

R., pp. 94-95.

After the entry of said decree, F. S. Hall, one of the original defendants, sued as Commissioner of Finance and Taxation of the State of Tennessee, resigned said office and was succeeded by Albert S. Williams; and thereupon, by agreement, plaintiff's bill was dismissed as to the said F. S. Hall, and said Albert S. Williams, as Commissioner of Finance and Taxation of the State of Tennessee, was substituted as one of the defendants to the original bill in the room and stead of the said F. S. Hall.

APPEAL.

Thereupon, defendants in the court below petitioned for and were granted an appeal to this Court.

ASSIGNMENT OF ERRORS.

The assignments of error submitted and filed with the petition for appeal is found in the Record at pages 134 and 135, and is as follows:

"I.

"That the Court was in error in holding the Act of the General Assembly of Tennessee, challenged and complained of in this cause, to be unconstitutional, because said Act is a valid and proper exercise of the

police power of the state in its declared purpose of preventing monopoly and extortion and protecting intra-state commerce and transportation.

"II.

"That the Act of the General Assembly of Tennessee complained of and held by the Court to be in violation of the Fourteenth Amendment to the Federal Constitution is a proper and valid regulation of the gasoline industry affected with the public interest, and which industry is a proper subject of state regulation.

"III.

"That it is within the just and reserved powers of the State of Tennessee to regulate and fix reasonable prices for the sale and distribution within the state of gasoline—a commodity the sale and distribution of which affects, directly and indirectly, all the people of Tennessee.

"IV.

"The opinion and holding of the Court to the effect that the entire Act was unconstitutional was erroneous even if the price-fixing provisions of the Act were beyond the power of the state.

"It was and is the obvious purpose of the General Assembly to exercise all the power the state had or has in regulating the gasoline industry and remedy the evils recited in the Act, and even if that part of the Act relating to fixing prices should be held invalid, the other provisions of the Act separate and distinct therefrom should be sustained and enforced. The Court was therefore in error in failing to sustain all the provisions of the Act except the price-fixing provision, even assuming that to be invalid.

"V.

"The Court was in error in issuing the injunction, because the plaintiff had a plain, adequate, and complete remedy at law."

PROPOSITIONS OF LAW.

I.

(a) The Standard Oil Company of Louisiana, in respect of their intra-state business in Tennessee, is, in fact and in law, the same interests represented by the Standard Oil Company of Kentucky, ousted from doing business in said state, and is not lawfully entitled to carry on its said business therein or to complain of the Act of 1927.

(b) The appellee herein is allied with and combined with the Standard Oil Company in monopolizing and controlling the sale of gasoline in Tennessee at unreasonable and unjust prices and, therefore, is not entitled to carry on its business therein and to attack the Act of 1927.

Upon the facts hereinbefore set out (p. 9-10, and R., pp. 28-34), showing that both the Standard Oil Company of Kentucky and the Standard Oil Company of Louisiana are owned and controlled by the Standard Oil Company of New Jersey, and further showing the manner and circumstances under which the Louisiana corporation was organized and came to do business in Tennessee, the Court will look through the veil or shell of the corporate organization of the latter company to ascertain the real controlling interests for which said Louisiana corporation is acting and for which it was brought into Tennessee, and, having so found, hold that said Louisiana corporation represents the same interests controlling the Kentucky corporation, ousted from the State of Tennessee, and that it is subject to the judgment of ouster and the injunction prohibiting it from doing business in Tennessee, hereinbefore referred to.

Moriwetz on Private Corporations, Sec. 227;
Cook on Corporations, 6 Ed., Sec. 709;
McGaskill vs. U. S., 216 U. S., 515;
People of N. Y. vs. North River Sugar Refining Co., 121 N. Y., 582, 9 L. R. A., 33;
State Ex Rel Watson vs. Standard Oil Co., 49 Ohio, 137, 15 L. R. A., 156;

Towles & Co. vs. Miles, 131 Tenn., 79;
Dillard and Coffin Co. vs. Richmond Oil Co., 140 Tenn., 298;
LePage Co. vs. Russia Cement Co., 51 Fed. Rep., 941;
Beal vs. Chase, 31 Mich., 490.

II

A foreign corporation is not entitled to carry on its business in any state except by complying with the conditions prescribed by such state.

Crescent Oil Co. vs. Miss., 257 U. S., 129;
Yeiser vs. Dysart, 267 U. S., 538;
Hall vs. Geiger, 242 U. S., 539;
Caldwell vs. Sioux Co., 242 U. S., 558;
Merrick vs. Halsey, 242 U. S., 569.

In the Crescent Oil Company case, *supra*, this Court, among other things, said:

> "Where, as we have found in this case, a foreign corporation has no Federal right to continue to do business in a state, and where, as here, no contract right is involved and there is no employment by the Federal Government, it is the settled law that a state may impose conditions, in its discretion, upon the right of such a corporation to do business within the state, even to the extent of excluding it altogether. *Horn Silver Mining Co. v. New York*, 143 U. S., 305; *Baltic Mining Co. v. Massachusetts*, 231 U. S., 68, 83, and cases cited. And in such case the inherent difference between corporations and natural persons is sufficient to sustain a classification making restrictions applicable to corporations only. *Hammond Packing Co. v. Arkansas*, 212 U. S., 322, 343, 344; *Baltic Mining Co. v. Massachusetts*, 231 U. S., 68, 83. And see *Fort Smith Lumber Co. v. Arkansas*, 251 U. S., 532; *American Sugar Refining Co. v. Louisiana*, 179 U. S., 89; *Williams v. Fears*, 179 U. S., 270, 276; *W. W. Cargill Co. v. Minnesota*, 180 U. S., 452.

"This would be sufficient to dispose of this second contention, but we may add that the law assailed was enacted by the state in the exercise of its police power, to prevent a practice conceived to be promotive of monopoly with its attendant evils."

257 U. S., 137.

In the case of Yeiser vs. Dysart, *supra*, this Court held that inasmuch as lawyers practice their profession by virtue of licenses from a state, the state has the right to regulate their charges.

If the State of Tennessee has the right to say to the Standard Oil Company, You shall not do business in this state, has it not the right to say, You may do business in this state only when you are willing to sell gasoline at reasonable and fair prices?

In the Hall, Caldwell, and Merrick cases, *supra*, this Court sustained the Blue Sky Laws of Ohio, South Dakota, and Michigan; and in each of these laws the dealer and owner of securities, stocks, bonds, etc., were prohibited from putting same on the market until they had obtained permits to do business; and we submit that the requirements in reference to the applications for business permits were very similar to those in the Tennessee Act now under consideration.

In each case a Commissioner was given the power to decline to grant a permit unless he was satisfied with reference to the value of the securities offered, the honesty of the business and good character of the dealer or owner offering the securities for sale.

In each case the Commissioner was vested with authority to decline to permit the owner or dealer to do business and sell the securities in question at all unless and until it was satisfied with reference to the matters indicated.

One can hardly imagine a more drastic limitation on the rights of a person to deal with his own property—yet these acts were sustained as a proper exercise of the police power for the protection of the public.

The proposition above stated and the cases supporting

same are particularly applicable to the Fourth Assignment of Error. (*Supra*, p. 23.)

III.

Courts take cognizance of all matters of general knowledge, and may make use of its knowledge of facts with which they have become familiar by a series of preceding cases.

Schollenberger vs. Penn., 171 U. S., 1;
Austin vs. State, 110 Tenn., 563, 566;
United States vs. Teschmaker, 22 Howard, 392;
Knight vs. U. S. Land Association, 142 U. S., 161;
Jameson vs. Ind. Natural Gas Co., 127 Ind., 555;
Sparrow vs. Strong, 3 Wallace, 97, 104;
Muller vs. Oregon, 208 U. S., 412.

In the Schollenberger case, *supra*, it was in effect held that no particular proof is required of those facts which by human observation and experience have become generally known to be true.

In the Austin case, *supra*, it was held that it was not essential that the facts and circumstances should have been recorded in written history or science to entitle courts to take judicial notice of them.

In the Jameson case, *supra*, it was held that courts take judicial notice that natural gas is so far a necessity that the right of eminent domain may be invoked by a corporation to obtain a right of way for its pipe lines.

In Sparrow vs. Strong, 3 Wall, 97, 104, this Court took cognizance of the tremendous growth of the mining interests; therefore, why should it not take cognizance of the unparalleled growth of the marketing or sales of gasoline in Tennessee, and the further fact that this commodity enters into close touch with, and is essential to, nearly every human activity in Tennessee?

In Muller vs. Oregon, 208 U. S., 412 (52 L. Ed.), 551, 555, Mr. Louis D. Brandeis, now Mr. Justice Brandeis, appeared for the State of Oregon and incorporated in his brief numerous authorities for documents, resolutions, and legislation

bearing upon the question involved as to whether the State of Oregon had the right to regulate the hours of labor, and it is manifest that these were considered by this Court, it being, among other things, said:

> "We take judicial cognizance of all matters of general knowledge."

IV.

Every presumption and reasonable intendment is in favor of the constitutionality of the Act.

The above proposition is elementary when the validity of an Act of the Legislature, passed with due form and ceremony, is under consideration; but it is not improper to call to the attention of the Court the following cases—Federal and State:

In *Brown vs. Maryland*, 12 Wheat, 436, wherein a statute of Maryland was challenged for repugnance to the commerce clause of the Federal Constitution, Chief Justice Marshall said:

> "It has been truly said that the presumption is in favor of every legislative act, and that the whole burthen of proof lies on him who denies its constitutionality."

In the Sinking Fund cases, 99 U. S., 718, Chief Justice Waite, among other things, said:

> "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

In *Arizona Copper Company vs. Hammer*, 250 U. S., 400 (63 L. Ed. 1058), the Arizona Employer Liability Act was

under consideration, and it was insisted that said Act violated the Fourteenth Amendment to the Federal Constitution; and it was, in substance, held that those challenging such legislation designed to promote the general welfare have the burden to show that the effect thereof is unreasonable and arbitrary and has no substantial relation to the end desired before such legislation can be brought within the inhibition of said amendment.

In dealing with the validity of the state's statute the Court will not destroy it except upon the clearest grounds. This rule was applied by this Court in *Knoxville vs. Knoxville Water Company*, 212 U. S., p. 8. In that case there had been findings of fact by a Master and confirmed by the Court upon which it was held that certain water rates were unreasonable, and therefore unlawful. In considering this phase of the case, the Court, speaking through Mr. Justice Moody, said:

> "We need not stop to consider what the effect of such findings would be in an ordinary suit in equity. The purpose of the suit is to arrest the operation of a law on the ground that it is void and of no effect. It happens that in this particular case it is not an Act of the Legislature that is attacked, but an ordinance of a municipality. Nevertheless, the function of rate-making is purely legislative in its character; and this is true, whether it is exercised directly by the Legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the Legislature and must be regarded as an exercise of the legislative power. *Prentis vs. Southern R. Co.*, 211 U. S., 210 ante, 67, 29 Sup. Ct. Rep., 67; *Honolulu Rapid Transit & Land Co. vs. Hawaii*, 211 U. S., 282 ante, 55, 29 Sup. Ct. Rep., 55."

In the case of Adkins vs. Children's Hospital, 261 U. S., 525, 544, this Court said:

"This Court, by an unbroken line of decisions, from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an Act of Congress until overcome beyond a rational doubt."

See also:

Middleton vs. Texas Power, etc., Co., 249 U. S., 152;
Mt. Timber Co. vs. Washington, 243 U. S., 219;
Green vs. Frazier, 253 U. S., 233;
Manufacturing Co. vs. Falls, 90 Tenn., 466;
State Ex Rel vs. Brewing Co., 104 Tenn., 715, 740;
Railroad vs. Byrne, 119 Tenn., 278, 291, 292.

V.

Upon the facts disclosed in the record the gasoline industry in Tennessee has been devoted to and is clothed with a public interest, and the legislation complained of was enacted in the proper exercise of the police power of the state.

Munn vs. Ill., 94 U. S., 113-154;
Allnutt vs. Englis, 12 East., 527, 539, 542;
Brass vs. North Dakota, 153 U. S., 391;
Budd vs. New York, 143 U. S., 517;
German Alliance Insurance Co. vs. Lewis, 233 U. S., 389, 391, 410, 411, 415-417;
Stafford vs. Wallace, 258 U. S., 495;
Oklahoma Natural Gas Co. vs. Oklahoma, 258 U. S., 234, 237-239;
Wolff Pack. Co. vs. Court of Industrial Relations, 262 U. S., 522, 535, 536, 538-541;
Oklahoma Operating Co. vs. Love, 252 U. S., 331;
Oklahoma Gin Co. vs. State, 252 U. S., 339;
Rail & River Co. vs. Yappel, 236 U. S., 338;
McLean vs. Arkansas, 211 U. S., 539;
Knoxville Iron Co. vs. Harbison, 183 U. S., 13;
Same case, 103 Tenn., 421;
Dayton Coal, Iron, etc., Co. vs. Barton, 183 U. S., 23;
Same case, 103 Tenn., 604;
Leeper vs. State, 103 Tenn., 500-531, 532.

ARGUMENT.

To What Does the Police Power of the State Extend?

It has never been limited by express definition.

In Cooley on Constitutional Limitations, p. 707, it is said:

> "Police power in its broadest acceptation means the general power of a government to preserve and promote public welfare, even at the expense of private right."

In People vs. Budd, 117 N. Y., 1 (affirmed by this Court in 143 U. S., 517), it was, among other things, said:

> "All property, all business, every private interest may be affected by it and brought within its influence. Under it the Legislature regulates the use of property, prescribes rules of personal conduct, and in numberless ways, through its pervading and ever-present authority, supervises and controls the affairs of men in their relation to each other and to the community at large, to secure the mutual and equal rights of all, and promote the interest of society. It has limitations; it cannot be arbitrarily exercised to deprive the citizen of his liberty or his property. But a statute does not work such a deprivation in the constitutional sense simply because it imposes burdens or abridges freedom of action, or regulates occupations, or subjects individuals or property to restraints in matters in difference, except as they affect public interests or the rights of others. Legislation under the police power infringes the constitutional guaranty only when it is extended to subjects not within its scope and purview, as that power was defined and understood when the Constitution was adopted. The generality of terms employed by jurists and publicists in defining the power, while they show its breadth and the universality of its presence, nevertheless leave its boundaries and limitations indefinite, and impose upon the court the necessity, as each case arises, to determined whether the particular

statute falls within or outside of its appropriate limits."

It extends to the safety, health, morals, comfort, and welfare of the people and expands to meet new conditions.

Leeper vs. State, 103 Tenn., 532;
Knoxville Iron Co. vs. Harbison, *supra;*
Dayton Coal, Iron, etc., Co. vs. Barton, *supra;*
Knoxville vs. Knoxville Water Co., 107 Tenn., 686.

In Leeper vs. State, 103 Tenn., 500-531, *et seq.*, it was, among other things, said:

"What is the scope and meaning of the term 'police power' has never been defined. The Supreme Court of the United States has expressly declined to define its limits. Stone v. Miss., 101 U. S., 814.

"In Mayor of New York v. Miln, 11 Pet (U. S.), 139, it is said: 'It embraces every law which concerns the welfare of the whole people of the state, or of any individual within it and upon the persons and things within it.'

"In Hanibal R. R. Co. v. Husen, 95 U. S., 465, it is said: 'The police power of a state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and to the protection of all property within the state, and hence to the making of all regulations promotive of domestic order, morals, health, and safety.'

"In Smith v. The State, 16 Pickle, 505, it is said, in substance, that it extends to all questions of health, morals, safety, order, comfort, and well-being of the public, and that this enumeration does not make the list complete."

In In Re: Rahrer, 140 U. S., 554, the Supreme Court of the United States, speaking through Mr. Justice Fuller, said:

"The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. And this court has uniformly recognized state legislation, legitimately for police purposes, as not, in the sense of the Constitution, necessarily infringing upon any right which has been confided expressly or by implication to the national government. The Fourteenth Amendment, in forbidding a state to make or enforce any law abridging the privileges and immunities of citizens of the United States, or to deprive any person of life, liberty, or property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws, did not invest, and did not attempt to invest, Congress with power to legislate upon subjects which are within the domain of state legislation."

As above stated, this Court has not, by express definition, limited the extent and application of the police power of a state, and has laid down no hard and fast rule restricting its exercise to any given class of cases.

New circumstances and new conditions must be dealt with as they arise, and frequently a business which, under ordinary circumstances, would be treated as purely private business, becomes through its increased importance to the public welfare, charged with a public interest.

As stated by the Court in *Wolff vs. Industrial Court*, 262 U. S., 522:

"Businesses which, though not public at their inception, may be fairly said to have risen to be such, and have become subject in consequence to some government regulation. They have come to hold such peculiar relation to the public that this is superimposed upon them."

In the case of *German Alliance Insurance Co. vs. Lewis, supra*, this Court sustained an Act extending and applying the police of the state to the regulation of the business of fire insurance companies and fixing the prices to be charged.

In the case of *Rail & River Co. vs. Yaple, supra*, this Court said:

> "The objection that the law is unconstitutional as unduly abridging the *freedom of contract* in prescribing the particular method of compensation to be paid by employers to miners for the production of coal was made in the case of *McLean v. Arkansas*, 211 U. S., 539, 53 L. Ed., 315, 29 Sup. Ct. Rep., 206, in which the court sustained a law of the State of Arkansas, requiring coal mined to be paid for according to the run-of-mine system according to its weight when brought out of the mine in cars. In that case the constitutional objections founded upon the right of contract which are made here were considered and disposed of. This court has so often affirmed the right of the state, in the exercise of its police power, to place reasonable restraints like that here involved, upon the freedom of contract, that we need only refer to some of the cases in passing. *Schmidinger v. Chicago*, 226 U. S., 578; 57 L. D., 364; 33 Sup. Ct. Rep., 182; Ann Cas. 1914B, 284; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S., 549; 55 L. Ed., 328; 31 Sup. Ct. Rep., 259, and cases cited therein and reviewed."

These are but a few of the cases holding that the police power of the state extends to and controls all conditions, as they arise, affecting the safety, health, morals, comfort, and welfare of the people, and meeting new conditions as progress—yes, evolution, if you please—in business conditions, converts a former convenience or luxury into an absolute necessity. And this Court will be slow to review, if it does not hold that it cannot review, the economies and facts upon which the Legislature bases its conclusions that an existing evil should be remedied by an exercise of its police powers.

Central Lumber Co. vs. South Dakota, 226 U. S., 157, 161.

The facts relied on showing that the gasoline industry is clothed with a public interest are not denied, and are fully set out in the answer. (R., pp. 51-54.)

It is to be noted that in its bill the appellee here does not anticipate or attempt to deny the existence of the facts and conditions set forth in the answer which caused the Governor of Tennessee to appeal to the Legislature for relief for the public, and which resulted in the Act of the Legislature complained of.

Now, for the purpose of applying the principles controlling rate or price regulation to the evils complained of by the State of Tennessee, we ask the Court's indulgence while we re-state, briefly as may be, the practically undenied conditions sought to be changed and remedied by the General Assembly of Tennessee:

1. *Matters of common knowledge of which this Court can take cognizance.*

It is practically impossible, and deemed unnecessary, to set out all of such matters bearing upon the issues in this case; but, generally speaking, it is commonly known that the Standard Oil Companies, and other dealers or subsidiaries to it, or confederated with it, endeavor to control and dominate the gasoline industry, to the injury of the public, by price-fixing and cutting to destroy competition, by rebates and discriminations in favor of retail dealers and customers in localities where a monopoly can be more easily secured by such practices.

These conditions are well described in an opinion of the Circuit Court of Appeals for the Second Circuit, in the case of *Mennen Company vs. Federal Trade Commission,* 288 Fed. Rep., 774, 778, 779, where, among other things, it is said:

> "It is a matter of common knowledge that prior to the enactment of the Clayton Act a practice had prevailed among large corporations of lowering the prices

asked for their products in a particular locality in which their competitors were operating for the purpose of driving a rival out of business. Such lowering of prices was maintained within the particular locality while the normal or higher prices were maintained in the rest of the country; and this practice was continued until the smaller rival was driven out of business, whereupon the prices in that locality would be put back to the normal level maintained in the rest of the country. The Clayton Act was aimed at that evil. This appears from the report of the Judiciary Committee of the House of Representatives, from which we quote as follows:

" 'Section 2 of the bill is intended to prevent unfair discriminations. It is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also some smaller concerns which seek to secure a monopoly in trade and commerce by aping the methods of the great corporations, have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country. . . .

" 'The necessity for legislation to prevent unfair discriminations in prices with a view of destroying competition needs little argument to sustain the wisdom of it. In the past it has been a most common practice of great and powerful combinations engaged in commerce —notably the Standard Oil Company, the American Tobacco Company, and others of less notoriety, but of great influence—to lower prices of their commodities oftentimes below the cost of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made. . . .

" 'In seeking to enact this section into law we are not dealing with an imaginary evil or against ancient practices long since abandoned, but are attempting to deal with a real, existing, widespread, unfair and unjust trade practice that ought at once to be prohibited in so far as it is within the power of Congress to deal with the subject.' "

2. *The history of the petroleum industry, as portrayed by the decisions of this Court,* and other courts of last resort, is referred to in the answer of appellants (R., pp. 29-33), is known to this Court, and is not denied by appellee.

Standard Oil Co. vs. State of Tenn., 117 Tenn., 618;
State vs. Standard Oil Co., 120 Tenn., 86;
Standard Oil Co. vs. U. S., 221 U. S., 1;
Standard Oil Co. vs. State, 217 U. S., 817;
Standard Oil Co. vs. Mo., 224 U. S., 761;
Waters Pierce Oil Co. vs. Texas, 212 U. S., 86;
Standard Oil Co. vs. State, 107 Miss., 227;
State vs. Standard Oil Co., 15 L. R. A., 145; 49 Ohio State, 137;
State vs. Standard Oil Co., 218 Mo., 1.

These cases disclose the unrelenting and unswerving determination on the part of the Standard group, the dominant factor in the petroleum industry, to monopolize and control the entire industry, and this purpose has continued from the original organization of the Standard Oil Trust until the present day.

The methods employed, as set out in the opinion of Chief Justice White in *Standard Oil Co. of New Jersey vs. United States,* 221 U. S., 1, were to destroy competition by rebating, price-cutting, discriminatory practices, and the division of marketing territory among the various Standard groups.

The learned Chief Justice said in his opinion that from the facts establishing this purpose and intent it was *"so certain as practically to cause the subject not to be within the domain of reasonable contention."*

The holding and opinion of the learned and lamented for-

mer Chief Justice of this court in the case just referred to is so illuminating of conditions existing then and continuing to exist to the present day, that we deemed it proper to refer thereto in the answer of appellants (R., pp. 37-40), and to aver that such conditions continued to exist in these United States and in the State of Tennessee.

3. *Dealers in gasoline in Tennessee have, in fact, a monopoly of that business.*

The facts in general terms in respect to the widespread and enormous use of gasoline in Tennessee in practically every department of human activity and concern are, as hereinbefore set forth and are stated in appellant's answer in detail.

R., pp. 52, 53.

It is shown that in the year 1926 there were sold and used in Tennessee 129,358,213 gallons of gasoline—an increase in sales and use of more than 39,000,000 gallons over that sold and used in the year 1924.

The appellee, and other dealers in gasoline, and their representatives, have done all in their power to devote gasoline to the public use by sedulous, widespread, continuous, informative propaganda as to its useful qualities in the home, in business, and in every department of life, and thereby have induced the people of Tennessee to purchase the enormous amount of gasoline hereinbefore referred to, and to so apply it to practically all departments of life that it has become an absolute necessity—which can be procured only from gasoline dealers in Tennessee whose charges and prices are sought to be regulated by the Act in question, so that—and only to the extent that—the citizens may secure this necessity at a *reasonable* price and the dealer may secure a *reasonable* profit or return.

4. *Ouster from the state under the anti-trust Acts would not give relief to the people of Tennessee.*

Tennessee has an Act inhibiting combinations and agreements lessening and tending to lessen full and free compe-

tition in the sale of commodities in Tennessee, which was sustained and enforced by the Supreme Court of that state and by this Court in the case (120 Tenn., 86; 217 U. S., 817) above referred to.

But while the appellee and other dealers in Tennessee, as shown upon this record, have been guilty of the unlawful practices denounced by said anti-trust Act, nevertheless it is manifest that to oust them from Tennessee would not afford relief.

This is shown by what happened when the Standard Oil Company of Kentucky was ousted by this Court, affirming the decree of the Supreme Court of Tennessee.

If these companies now doing business in Tennessee and guilty of practices denounced by said anti-trust Act were ousted from the state, it is practically sure that, in respect of the appellee, its place would be taken by another company of the Standard Oil group, and the place of other corporations would be taken by other companies—all claiming the right to sell this article of necessity—this article monopolized by them—at any price fixed by them, and by any means and methods, though denounced by the laws of Tennessee, used and invoked by them to control and dominate the gas industry of Tennessee to the hurt and injury of her people.

It is respectfully insisted that every measure or remedy hitherto intended to regulate this industry falls far short of relief to the people of Tennessee, and that such relief can only be applied effectively through this price-fixing statute, which guarantees to the dealer a reasonable price for his gasoline—and which, in effect, so far as legislation may avail, guarantees to the dealer a reasonable and fair price for his gasoline.

In this connection permit us to call to the attention of the Court a part of a report of a Senate Investigating Committee.

After more than fifty years of anti-trust legislation, Federal and State, and litigation thereunder attempting to curb the evils hereinbefore set out, the matter was investigated by the Manufacturers' Committee of the United States Sen-

ate in the winter of 1923; and in March of that year said committee, after having devoted several months to hearing testimony, and after having examined officials of the leading petroleum companies, made an exhaustive report to the Senate, and, in concluding said report, said:

> "It must be obvious from the facts set forth in this report that the business cannot go on as at present organized and conducted. It is essential to the life of the industry and vital to the public also that neither the public nor the small independent producers and refiners shall be left as at present at the mercy of a combination which advances or decreases prices as it pleases. Unless some means can be found to prevent the manipulation of prices by the large companies, and particularly the Standard group, it is as certain as a future event can be that gasoline prices in the near future will be so advanced as to put gasoline beyond the reach of the public generally as a motor fuel. Great as the capital invested in the business has become, important as the business is to thousands who are engaged in it, and to other thousands who receive dividends from it, *there is still more important interest to be reckoned with, and that is the interest of the public. Petroleum and its products have become an absolute necessity. The business is clothed with a great public interest. The gas plants, electric light plants, railroads, and street cars are no longer greater universal necessities than petroleum and its products.*"
>
> R., pp. 41-42.

The legislation challenged by the appellee Oil Company, and the other oil industries in Tennessee, is sustained by the decisions of this court as a valid exercise of the state's police power.

The cases referred to and relied upon for the proposition just stated are those cited under our fifth proposition of law, *supra* (p. 30), and others which have received full consideration by this Court in its opinions delivered within recent

years; and it is not deemed necessary to discuss and analyze all of them, and we will confine our discussion to some of them hereafter to be noted.

We are not unmindful of the recent decisions of this Court relied upon by appellee, and particularly the cases of *Tyson vs. Banton*, 264 U. S., 140; *Fairmont Creamery Co. vs. Minnesota*, 274 U. S., 1; and *Ribnik vs. McBride*, decided on May 28, 1928.

These cases are clearly distinguishable in their facts from the case at bar.

The distinction between a place of amusement or selling of theater tickets (Tyson vs. Banton, *supra*) and a commodity of such universal use—a commodity absolutely essential to modern conditions—as gasoline, is too obvious for discussion.

In the *Creamery case*, as we understand it, this Court treated the question submitted to it as being, in substance, whether the Creamery company had the right to enter into a fair and "normal contract, long regarded not only essential to the freedom of trade in commerce, but also beneficial to competitors." That is not this case, nor anything akin to it.

The Act now in question before your Honors is intended to provide a fair and reasonable price to the dealer and to prevent the destruction of competition, the use of rebates and discriminations between customers, long denounced by both Federal and State statutes.

In the *Ribnik case* the Court merely held that the business of an employment agent is not so affected with a public interest as to enable the state to fix charges to be made by said agent.

So it is respectfully submitted the facts of this and the cases above referred to are clearly distinguishable from the undisputed facts shown in this record which brought about the passage of the Act to relieve against the evils to the public therein referred to.

THE MUNN, ALLNUT, AND WOLFF CASES.

The principles announced and enforced in these cases sustain the Act complained of upon two grounds:

(1) The gasoline industry in Tennessee has been carried on, and is being carried on, in such a manner as makes it of utmost public consequence affecting the community.

(2) Dealers in gasoline, though without a grant or governmental franchise, have a virtual monopoly of the sale and distribution of gasoline in Tennessee.

The undisputed facts above referred to sustain both propositions and bring this case directly within the principle announced in the three cases above referred to.

The Munn case is the guidepost—the chart.

In the Munn case (94 U. S.), this Court, speaking through Chief Justice Waite, said:

> "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to being controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."
>
> R., p. 126.

And again:

> "Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long known and well established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in

their property, but to declare their obligations, if they use it in this particular manner."

R., p. 133.

Further, in the Munn case, it is recognized that a monopoly, though not built upon a governmental grant or franchise, justifies regulation of rates and prices.

This Court followed some of the early English cases dealing with this particular question—among others, the case of *Allnut vs. Inglis*, 12 East, 527.

In that case it is held that the right of a state to regulate charges applies not only to monopolies arising out of a grant from the sovereign, *but also to conditions where there is in fact a monopoly.*

In discussing this question, Lord Ellenborough, C. J., among other things, said:

> "The question then is, whether, circumstanced as this company is, by the combination of the Warehousing Act with the Act by which they were originally constituted, and with the actually existing state of things in the Port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a reasonable compensation for such warehousing. And, according to him, whenever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf."

And further on:

> *"It is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches, as laid down by Lord Hale in the pas-*

sage referred to (that from De Portibus Maris already quoted), which includes the good sense as well as the law of the subject." (Italics are ours.)

The Allnut case was approved by this Court in the Munn case, and, to us it seems, entered largely into the result reached by the Court.

In the *Wolff* case this Court had under consideration a Kansas statute involving the right of a state, through an Industrial Commission, to practically take charge of a Packing Company, fix rates of labor, compel a continuance of business, etc.; and in determining the validity of said statute, this Court, among other things, said:

"Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament of Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. *State v. Edwards,* 86 Mo., 102; *Terminal Taxicab Co. v. District of Columbia,* 241 U. S., 252, 254.

"(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and sub-

jects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner and to be entitled to protection accordingly. *Munn v. Illinois*, 94 U. S., 113; *Spring Valley Water Works v. Schettler*, 110 U. S., 347; *Budd v. New York*, 117 N. Y., 1, 27; s. c. 143 U. S., 517; *Brass v. Stoeser*, 153 U. S., 391; *Noble State Bank v. Haskell*, 219 U. S., 104; *German Alliance Insurance Co. v. Lewis*, 233 U. S., 389; *Van Dyke v. Geary*, 244 U. S., 39, 47; *Block v. Hirsh*, 256 U. S., 135."

262 U. S., pp. 535, 536.

"In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation."

"To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation."

262 U. S., p. 539.

And on page 540 quoted the following from the Munn case:

> "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control.*"

It is insisted that the undisputed facts of this case, hereinbefore referred to, bring this case squarely within the third classification above set out.

Whatever may have been the nature of the gasoline industry in its beginning, certainly it has come to be of such public consequence as subjects itself to governmental regulation.

"Public consequence" not only by reason and character of business and the manner in which it is carried on, but because said business as carried on in Tennessee, is a virtual monopoly requiring regulation for the protection of the public.

In the case of *Van Dyke vs. Geary*, 244 U. S., 39, this Court sustained an Act of the State of Arizona under which a water system, owned by private individuals, was regulated by the Utilities Commission and its prices thereby fixed, notwithstanding the fact that the owners had none of the franchise rights or privileges referred to in Chief Justice Taft's first classification. The Court placed the case in the third classification under the authority of the Munn case and sustained the price-fixing Act because—quoting from the Munn case:

> "Property becomes clothed with a public interest when used in a manner to make it of public consequence and to affect the community at large."

In the case of *The Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S., 549, this Court held that the freedom of contract was not infringed by amending the provisions of the Iowa Code, Sec. 2071, defining the liability of railroad corporations for injuries resulting from negligence and mismanagement in the uses and operation of their railways, so that a railway company, when sued on such liability, was precluded from making the defense that a recovery was barred by the acceptance of benefits under a contract of membership in its relief department.

The opinion lays down the following principles as to the validity of such legislation:

> "(1) Where police legislation has a reasonable relation to an object within granted authority, the legislative discretion is not subject to judicial review.
>
> "(2) The scope of judicial inquiry as to a statute is limited to the question of the *power* to enact it, while the scope of legislative consideration includes *the matter of policy.*
>
> "(3) When the legislature has power to establish a regulation it has also the power to *prohibit contracts in derogation of such regulation.*

Noble State Bank v. *Haskell, Governor, and Other Officials*, 219 U. S., p. 104. This case concerns an act of the legislature of that State and amendment thereto, creating a fund by taxing the banks such a percent on the average daily deposits for the benefit of depositors in the banks becoming insolvent throughout the State.

The Court says:

> "It may be said, in a general way, that the police power extends to all the great public needs. 117 U. S., 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality, or strong and preponderant opinion, to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforc-

ing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against such deposits; to such an extent do checks replace currency in daily business. If the legislature of the State thinks that the public welfare requires the measure under consideration, authority and principle are in favor of the power to enact it.

"The primary object of the required assessment is not a private benefit, as it was in cases above cited, of a ditch for irrigation or a roadway to a mine, but it is to make the currency checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means of keeping money on hand. The priority of claim to the depositors is incidental to the same object and is justified in the same way."

"The fact that it was a common law right of anyone to engage in banking does not deny power in the legislature to make it a franchise. There are many things a man may do at common law that the State may forbid. . . . One cannot say that the public interest to which we have adverted, and others, are not sufficient to warrant the State in taking the whole business of banking under its control. On the contrary, we are of the opinion that it may go on from regulation to prohibition, except such conditions as it may prescribe. In short, *when the legislature of Oklahoma declares by regulation that free banking is a public danger, and that incorporation, inspection and the above described co-operation are necessary safe-guards, the Court certainly cannot say that it is wrong.*"

p. 113.

The case of the *German Alliance Insurance Company* v. *Kansas*, 233 U. S., 389, distinctly declares that:

> "A public interest can exist in a business, such as insurance, distinct from a public use of property, and can be the basis of the power of the legislature to regulate the personal contracts involved in such business.

"Where a business, such as insurance, is affected by a public use, it is the business that is the fundamental thing; property is but the instrument of such business."

"The fact that a contract for insurance is one for indemnity and is personal, does not preclude regulation.

"A general conception of the law-making bodies of the country that a business requires governmental regulation is not accidental and cannot exist without cause."

"The liberty of contract guaranteed by the Fourteenth Amendment is not more intimately involved in price regulation than in other proper forms of regulation of business and property affected by a public use, and so *held* as to the regulation of rates of fire insurance."

While this was an insurance contract, it was a private contract. Stress was put upon the fact that the price of insurance was not fixed by agreement of the parties acting at arms-length. The Court says, on pages 416 and 417.

"We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that 'it is illusory to speak of a liberty of contract.'"

A close reading of the opinion makes it clear that it was the *power* the Company had to fix the rates it saw fit, whether reasonable or not. The rates concerned the entire public that desired insurance and gave an advantage over those desiring insurance that could not be overcome, however unreasonable the rate fixed.

This is certainly true of the advantage held by dealers in gasoline in Tennessee under the facts averred in the pleadings as hereinbefore set out. The appellee here and those confederated with it absolutely control the prices to be paid

by the public. It is not conveivable that any greater power could exist, than they have, to make the prices to the consumer unreasonable, arbitrary and oppressive. We have no case here of a statute fixing prices of articles bought and sold in the course of trade. It is a situation amounting to a practical monopoly of the oil business and the power to exact unreasonable and arbitrary prices—that is, the legal support of the Act sought to be invalidated.

In addition to the quotations made from the case of *Wolfe* v. *Industrial Co.*, 262 U. S., 536, the following is apt in its application to the case here:

> "The circumstances which clothe a particular kind of business with a public interest in the sense of *Munn* v. *Ill.*, must be such as to create a peculiarly close relation between the public and the one engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public."

There is certainly a peculiar relationship between the public and the appellee here and its confederates engaged in the actual control of the gasoline industry and trade in Tennessee as to raise implications of an affirmative obligation on their part to be reasonable in dealing with the public. The State has no greater duty to the public than to insure the freedom of competition in commerce in the State. Whenever a trade assumes such proportions as to make this practically impossible, the police power is adequate, and this is all the Act here attacked undertakes to do.

There is nothing sacred in the mere fact of the regulation as to price. If that regulation in any statute, the aim of which is to protect the public, or any great part of the public, in the right to have the commerce of the State free of absolute control by any individual or corporation, or any number of individuals or corporations, and by such control to fix a common charge that cannot be avoided in the usual freedom of negotiation in the matter of contracting, it is as valid as any other regulation fixed by the legislature under its police power, aimed at protecting the commerce of the State on any subject from the arbitrary control of any dealer or dealers confederated or working together to create

a situation that leaves no freedom to the individual who has to deal in the article bought and sold and controlled by such dealer or dealers acting together by methods that deprive any consumer of such article of his right to have any say in the matter of price he shall pay for it.

The Court below having held the Act of the Tennessee Legislature in conflict with the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, and not having passed on the objections made to it under the Constitution of Tennessee in the bill of complaint, it is sufficient to say that in paragraphs "V," "VI," and "VII" of the answer it is controverted that said Act is in conflict with the Due Process and Equal Protection clauses of the Fourteenth Amendment, and that it is in all respects valid.

Rec., pp. 49, 50.

VI.

If the price-fixing features of this Act are invalid, nevertheless the other regulatory features are valid, and should be sustained, as insisted in the Fourth Assignment of Error. (R., 117.)

OPINION OF DISTRICT COURT.

On this subject the lower court held:

> "It is further argued for the state that even though it be held that the Act is invalid in so far as it attempts to confer upon the state the power to fix the prices at which gasoline shall be bought and sold, the purposes of the Act are so varied and separable that it may and should be upheld in other particulars. If it may be said that with the price-fixing features of the Act stricken therefrom the legislation would have been enacted, the entire Act should not be declared invalid. The Act itself provides 'that if any section or provision of this Act shall be held invalid, this shall not affect the validity of other sections or provisions thereof.' There are thirteen sections in the Act, the

first of which is in the form of a preamble referred to, the next nine deal in the main with the subject of regulating and fixing the prices of gasoline, Section 11 defines the term gasoline, Section 12 provides, as we have just stated, that if any section of the Act shall be held invalid it shall not affect the other sections or provisions thereof, and Section 13 provides only for the effective date of the Act. *Notwithstanding the legislative declaration, it seems clear to us that the main purpose of the Act is to regulate and fix the prices at which gasoline shall be bought and sold, and it is inconceivable that except for that purpose the legislation would have been enacted.*" (R., p. 109, 119.) (Italics are ours.)

ARGUMENT IN SUPPORT OF FOURTH ASSIGNMENT OF ERROR. (R., pp. 117.)

We respectfully challenge the correctness of the conclusion and holding of the learned District Court. On the contrary, we submit that the Legislature of Tennessee intended to exert *all its sovereign* power in regulating this industry and prohibiting all the evils in the trade it had the power to prohibit.

Price-fixing was but *one* of the remedies. The obvious desire of the Legislature was to invoke *every possible remedy*. This is shown by the message of the Governor to the Legislature and by the preamble in the first section of the Act. (R., p. 13, p. 72 herein.) The regulatory features of this Act, aside from the price-fixing features, are aimed at the evils in the trade described by the Governor in his message, and shown to have existed for many years by the judicial history of the business and the plaintiff in this cause.

SEVERABLE PROVISIONS OF THE ACT ANALYZED.

The following provisions of the Act are clearly valid:

Provision requiring permits and the collection of data.

Section 1 provides for the establishment of a division of motors and motor fuel, which should be in charge of a super-

intendent to be appointed as other superintendents of divisions of the Department of Finance and Taxation. (R., pp. 13-14, pp. 72-73 herein.)

Section 2 provides that it shall be the duty of this superintendent to make investigations, collect data concerning the manufacture and sale of gasoline, the manner of carrying on the trade and business, the methods employed by dealers. This data was for the purpose of (a) aiding and fixing prices, and (b) that it "should be available for the inspection and information of the public, and said Commissioner is authorized, when deemed necessary, to make public by publication or otherwise the information secured hereunder." (R., p. 14, p. 73 herein.)

In view of the evils sought to be remedied, it is clear that the provision for the collection of this data and the publication of same would be a valuable aid in suppressing the evils complained of.

The State of Tennessee had an anti-trust Act passed in 1903, the first section of which provides:

> "Section 1. Be it enacted by the General Assembly of the State of Tennessee, and it is hereby enacted by the authority of the same, that from and after the passage of this Act, all *arrangements*, contracts, agreements, trusts or combinations between persons or corporations made with a *view to lessen*, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state, or in the manufacture and sale of articles of domestic growth or of domestic raw material, and all *arrangements*, contracts, agreements, trusts or combinations between persons or corporations *designed*, or which tend to *advance, reduce or control the price* or the cost to the producer or consumer of any such product or article, are hereby declared to be against public policy, unlawful and void."

This Court has sustained the validity of this Act in its application to the unfair practices of the Standard Oil Company.

This Act was amended by the Legislature in 1927, at the same session and just prior to the passage of the Act in controversy, the first section of which amendment is as follows:

> "Be it enacted by the General Assembly of the State of Tennessee, that Section 1, of Chapter 140, Acts of Tennessee, 1903, page 268 thereof, known as the Anti-Trust Act, be amended as follows:
>
> "That any arrangement, contracts and agreements that may be made by such corporation or person, by and between its agents and sub-agents, to sell and market its products and articles, manufactured in the state, or imported into this state, to any producer or consumer, *at prices reduced below the cost of production* or importation into this state, including the cost of marketing and a *reasonable and just marginal profit to cover wages or management and necessary incidentals, as is observed in the usual course of general business,* and contiuues such practice under such agreements, contracts and arrangements for an unreasonable length of time, to the injury of full and free competition, or make any other arrangements, contracts or agreements, by and between its agents and sub-agents, which tend to lessen full and free competition in the sale of all such articles manufactured and imported into the state, and which amount to a subterfuge for the purpose of obtaining the same advantage and purpose, are hereby declared to be against public policy, unlawful and void."
>
> Ch. 60, p. 201 of Acts of 1927.

It is quite clear that the data the superintendent is required by *Section 2* to ascertain and publish will be of great assistance to the officials of the state in enforcing the Anti-Trust Act, and this "pitiless publicity" of evil practices would prevent in some measure at least some of the evils complained of.

The case of Weller vs. New York, 268 U. S., 319, 322, and the case of Tyson vs. Banton, *supra*, involved the same statute of the State of New York. The main purpose of that Act was to fix the price of theater tickets and prevent the resale of tickets at any higher price, and it was made unlawful to do so without a license.

The Act appears in Sections 167 to 174 of the General Business Laws of the State of New York.

Section 168 provides that all those dealing in the resale of theater tickets should secure a license; such license should be granted upon the written application setting forth such information as the Comptroller might require.

Section 169 provides that the applicant should file with his application a bond conditioned that the applicant will not be guilty of any fraud or extortion, and will not exact or receive a price for any such ticket in excess of the price authorized by this article. This section further provides that a suit to recover on the bond might be brought by the Comptroller or on the relation of any party aggrieved.

Section 170 provides that if any licensee should be guilty of any fraud or misrepresentation, or shall charge for any ticket a price in excess of that authorized by the article, the Comptroller is authorized to revoke his license.

Section 171 authorizes the investigation of the business methods of such licensee.

Section 172 provides that no license shall issue to sell any ticket to a theater or other place of amusement at a price in excess of fifty cents in advance of the price printed on the face of the ticket.

Section 173 provides that any person violating the provisions of the Act by failing to procure a license and file the required bond shall be guilty of a misdemeanor.

Section 174 provides that any part of the Act declared invalid shall not affect the validity of the remaining provisions.

The defendant was indicted for a failure to apply for and obtain the license required by the Act. On the trial it was insisted that the price-fixing provisions of the Act were invalid.

The Court of Appeals of New York sustained a conviction. In affirming this conviction, the Supreme Court of the United States said:

> "In an extended opinion the latter court upheld the challenged enactment, but said nothing of the possibility of sustaining the license provisions if those relating to re-sale prices were invalid.
>
> "Counsel for plaintiff in error now insists that the two provisions are inseparable; that those which undertake to establish re-sale prices are clearly invalid; and, consequently, the whole Act must fall. On the contrary, counsel for the people maintain that the power of the state to require such license is clear, and that we need not determine the validity of the price restrictions.
>
> "It is not and, we think, it cannot seriously be argued that the state lacked power to require license of those engaging in the business of re-selling theater tickets.
>
> "The conviction and sentence were for failure to observe that requirement. In the absence of an authoritative announcement of another view by some court of the state, we shall hold this provision severable and valid. *Brazee v. Michigan*, 241 U. S., 240. The statute itself declares (174): 'In case it be judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect the validity of the remaining provisions of the article.' If 172, which restricts re-sale prices, were eliminated, a workable plan would remain. See *Dorchy v. Kansas*, 264 U. S., 286. The judgment of the court below is affirmed."
>
> 268 U. S., pp. 324, 325.

It will be noticed that in the case of *Tyson vs. Banton* the plaintiff complied with the valid provisions of the Act. The Court, in speaking of the Tyson Company, said:

> "It is duly licensed under Section 168, Ch. 590, New York Laws, 1922, and has given a bond under Section

169 of that chapter in the penal sum of $1,000.00 with sureties, conditioned, among other things, *that it will not be guilty of any fraud or extortion.* (See Weller v. New York, 268 U. S., 319, 322."

Certainly the New York Act was no more severable than the Act we are dealing with.

The principal object of the New York Act was to limit the prices to be charged by the ticket dealers. The application provided for in Section 168 of the Act must be accompanied by the bond provided for in Section 169.

It is obvious that after the elimination of the provisions held in the Tyson case to be invalid, only a part of the requirements as to the provisions of the bond in Section 169 are necessary to be complied with.

It is clear that the bond filed by Tyson only contained a part of the provisions of 169, as Mr. Justice Sutherland recites that the bond was conditioned, among other things, "that it will not be guilty of any fraud or extortion."

Treating the price-fixing provisions of the Act as invalid, necessarily eliminates that part of Section 169 with reference to the provision of the bond that recites: . . . "will not exact or receive a price for any such ticket or evidence of the right of entry, in excess of the price authorized by this Act."

Nor could a suit be brought to recover for a charge made in excess of this price, as provided in this bond.

In like manner that part of Section 170 providing for the revocation of licenses when a price in excess of that fixed has been charged must be eliminated. With this exception, the balance of the section is of course sustained.

In other words, in that case the Court not only eliminates sections, but parts of sections and parts of sentences in order to save a part of the Act.

In the instant case there is much more reason for sustaining the preliminary provisions of this Act in view of the history of the gasoline industry and the attempts of the state to regulate it.

In the case of *State vs. Howitt*, 107 Kansas, 423 (later affirmed by this Court), the Court sustained part of the In-

dustrial Relations Act, although the main features of that Act were held unconstitutional in the Wolffe case, 262 U. S., 522.

The Court said:

> "It is quite clear that the part of the Act relating to the conduct of an investigation could be upheld, although some of the attempted grants of power should be held void, even if the statute contained no reference to the effect of partial invalidity. However, one section of it reads as follows:
>
> " 'If any section or provision of this Act shall be found invalid by any court, it shall be conclusively presumed that this Act would have been passed by the Legislature without such invalid section or provision, and the Act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court.' (Laws 1920, Special Session, Ch. 29, Sec. 28.)
>
> "The rule is familiar that a part of a statute which is unobjectionable in itself may be enforced notwithstanding another part is adjudged unconstitutional, if it appears that the void portion was not an inducement to the enactment of the rest—that the Legislature desired the unobjectionable part to become a law irrespective of the validity of the remaining. *Here the express declaration disposes of any possible doubt that might otherwise exist as to the legislative intent,* and requires the court to give all portions of the statute that do not in themselves violate some constitutional provisions. (The State v. Wilson, 101 Kansas, 789, 806; 159 Pac., 679.)
>
> "No reasons are suggested, and none occur to us, why the Legislature may not authorize the court of industrial relations to conduct an inquiry into conditions existing in the mining fields, and in furtherance of that inquiry, require the attendance of witnesses."

See also Sallee v. Dalton, 213 S. W., 762;
Richardson v. Young, 122 Tenn., 471, 522-524;
Shea v. Mining Company, 55 Mont., 522;
State v. Trewitt, 113 Tenn., 561, 572.

In the cases of *Hall v. Geiger*, 242 U. S., 538; *Caldwell v. Sioux Falls Co.*, 242 U. S., 558; and *Merrick v. Halsey*, 242 U. S., 568, this Court sustained the Blue Sky Laws of the States of Ohio, South Dakota, and Michigan.

In each of these Acts the dealers in and owners of securities, stocks, bonds, etc., were prohibited from putting same on the market until they obtained a permit to do business. The requirements with reference to the application for the permits in these cases were very similar to those in the Act we are considering.

In each case a Commissioner was given the power to decline to grant a permit unless he was satisfied with reference to the value of the securities offered, the honesty of the business, and the good character of the dealer or owner offering the securities for sale.

In each case the Commissioner was vested with authority to decline to permit the owner or dealer to do business and sell the securities in question at all unless and until he was satisfied with reference to the matters indicated.

One can hardly imagine a more drastic limitation on the rights of a person to deal with his own property—yet these Acts were sustained as a proper exercise of the police power for the protection of the public.

Section 3 of the Tennessee Act makes it unlawful for any person, firm, or corporation to engage in the intra-state sale of gasoline without having obtained permit as provided in Section 2. Obviously this section is valid. (R., pp. 14-15, p. 73-74 herein.)

Section 4 (R., pp. 17, 18, p. 74 herein) provides that every person, firm, or corporation desiring to engage in intra-state commerce in gasoline in this state shall make application to the Superintendent of the Division of Motors and Motor Fuels for permit, and in this application he must set out the following information:

"(a) Whether he proposes to do a wholesale or retail business, or both; and if a wholesale business, the number and location of the different places at which he intends to operate; and if a retail business, the number and location of the different service stations and pumps he intends to operate.

"(b) If the applicant is an individual, give his name and address; if a partnership, the names and addresses of the members of the firm, the style of the firm, and the place or places at which it is intended to do business; if a domestic corporation, the location of its principal office and the names and addresses of its principal officers; if a foreign corporation, the state of its incorporation, its principal place of business in the state where chartered, and its principal place of business in this state, as well as the names and addresses of its principal officers, and the name and address of its principal agent or agents in this state.

"(c) The price or prices at which said dealer is at the time of the application selling gasoline at the different locations where he sells the same.

"(d) The cost price of such gasoline to said dealer, including the refinery cost, transportation cost, taxes and inspection fees, the cost of distribution, and such other costs and expenses as may enter into the price at which it is proposed to sell such gasoline.

"(e) The price or prices at which he proposes to sell gasoline as a wholesaler and as a retailer.

"(f) Such other information as may be prescribed by the Superintendent."

The propriety and importance of requiring this information is too obvious for discussion, in view of the history of the gasoline industry and the evils sought to be remedied. This information is absolutely essential if the provisions against rebating hereinafter to be referred to are valid, and in any event this information is of very great value to the officials of the state in enforcing the Anti-Trust Act.

Sections 5 and 6 (R., pp. 15-18, pp. 75-6-7 herein) give the Commissioner the power to decline a permit to the dealer

if the prices fixed by him are deemed improper, and the power to fix the price is given to the Commissioner of Finance and Taxation. If the price-fixing provisions of the Act are unconstitutional, all of Sections 5 and 6 are invalid except the preliminary provision for the issuance of the permit. Section 7 would in like manner be inoperative.

The provisions prohibiting rebating and discrimination are valid.

That part of *Section 8* (R., p. 18, p. 78 herein) which reads as follows violates no provision:

> "Be it further enacted, That it shall be unlawful for any person, firm or corporation, engaged in intra-state wholesale or retail gasoline business in Tennessee to grant any rebate to any customer or purchaser of said gasoline from any dealer, or to sell to any such purchaser or customer at a price different from that filed with the Commissioner of Finance and Taxation, or to grant any concession or gratuity, directly or indirectly, to any customer or purchaser for the purpose of inducing said purchaser or customer of said dealer to purchase, use or handle the gasoline of said dealer; and it shall be unlawful for any person, firm or corporation engaged in intra-state wholesale or retail sale of gasoline in Tennessee to discriminate against or in favor of any customer or purchaser of said dealer by selling at a different price to said purchasers in different localities in Tennessee to discriminate against or in favor of any customer or purchaser of said dealer by selling at a different price to said purchasers in different localities in Tennessee or to different purchasers in the same locality, provided the dealer may take into consideration the difference in freight rates to different localities."

The right to sell one's property at any price he chooses, as we have seen, is not an absolute right. A denial of this unlimited right is at the foundation of all the anti-trust

Acts. That price cutting and rebating has been one of the most potent weapons used by companies dealing in petroleum products for the destruction of competition and monopolizing the trade is undeniable. Chief Justice White especially emphasized this fact in the *Standard Oil case*, 221 U. S., p. 1. It was for this offense that the Standard Oil Company was ousted from Tennessee, 120 Tenn., 86. It was for this the Standard Oil Company of Indiana was ousted from *Missouri*, 224 U. S., 761. This was the basis for injunction in the case of *Nash v. United States*, 259 U. S., 273, and in *State v. Standard Oil Company*, 173 Federal, 177.

If rebating, price cutting, and discrimination may be prohibited by injunction, why may they not be prohibited by legislation? This question is put at rest by the decision of this Court in the case of *Central Lumber Company v. South Dakota*, 226 U. S., 157. In that case an Act of the Legislature prohibiting discrimination in prices between different sections or communities, and which prohibited the selling of any commodity at a lower price in one section or one community than in another section or community, after equalizing the distance, was attacked, because it was insisted that it violated the Fourteenth Amendment to the Constitution of the United States.

It was insisted that the Act was:

> "Intended for the protection of only a particular class—regularly established dealers; and because it unreasonably limits the rights of the people to make such bargains as they like."

It was also insisted that:

> "All competition . . . imports an attempt to destroy or prevent the competition of rivals, and there is no difference in principle between the prohibited act and the ordinary efforts of traders at a single place."

To which the Court responded:

"The premises may be conceded without accepting the conclusion that this is an unconstitutional discrimination. If the Legislature shares the now prevailing belief as to what is public policy, *and find that a particular instrument of trade war is being used against that policy in certain cases*, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."

And again:

"We must assume that the Legislature of South Dakota considered that the people selling in two places made the prohibited use of their opportunities, and that such use was harmful, although the usual efforts of competitors were desired. It might have been argued to the Legislature with more force than it can be to us that recoupment in one place of losses in another is merely an instance of financial ability to compete. If the Legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their state, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economies or their facts. That the law embodies a widespread conviction appears from the decisions in other states. State v. Drayton, 82 Neb., 254, 23 L. R. A. (N. S.), 1287, 130 Am. St. Rep., 671, 117 N. W., 768; State ex rel. Young v. Standard Oil Co., 111 Minn., 85, 126 N. W., 527; State v. Fairmount Creamery Co., 153 Iowa, 702, 42 L. R. A. (N. S.), 821, 133 N. W., 895; State v. Bridgman & R. Co., 117 Minn., 186, 134 N. W. 496."

And again:

"But the Supreme Court says that the statute is aimed at preventing the creation of a monopoly by

means likely to be employed, and certainly we should read the law as having in view ultimately the benefit of buyers of the goods. Finally, as to the statute's depriving the plaintiff in error of its liberty because it forbids certain class of dealings, we think it enough to say that as the law does not otherwise encounter the Fourteenth Amendment, it is not to be disturbed on this ground. The matter has been discussed so often in this Court that we simply refer to Chicago, B. & Q. R. Co. v. McGuire, 219 U. S., 549, 567, 568; 55 L. Ed., 328, 338, 339; 31 Sup. Ct. Rep., 259, and the cases there cited to illustrate how much power is left in the states. See also Grenada Lumber Co. v. Mississippi, 217 U. S., 433, 442; 54 L. Ed., 826, 831; 30 Sup. Ct. Rep., 535; Lemeiux v. Young, 211 U. S., 489, 496; 53 L. Ed., 295, 300; 29 Sup. Ct. Rep., 174; Otis v. Parker, 187 U. S., 606, 609; 47 L. Ed., 323, 327; 23 Sup. Ct. Rep., 168."

The Courts in the state cases cited above sustain Acts to prohibit discrimination and rebating as the proper method of preventing destruction of competition.

It will be noticed that counsel made the same argument in the Central Lumber case, *supra*, that is being made in the case at bar—to-wit, that the Act was passed for the benefit of the small dealer and that it tended to destroy competition, instead of preserving it.

Adversary counsel rely on the case of *Fairmount Creamery Company v. State of Minnesota*, 274 U. S., 1-11. In that case, however, there was no condition of the trade sought to be regulated that required any such legislation as that involved. On the contrary, this Court held that the Legislature directly interfered with the method of doing business which was wholly unobjectionable *with reference to that particular trade.*

The Court referred with approval to several of the cases we have herein cited, especially *Purity Extract Co. v. Lynch, infra*, and *Merrick v. Halsey, supra.*

After referring to these cases, the Court said:

"But all those cases recognize the duty of the court to inquire into the real effect of any statute duly challenged because of interference with freedom of contract guaranteed by the Fourteenth Amendment, and to declare it invalid when without *substantial relation to some evil within the power of the state to suppress* and a clear infringement of private rights."

With reference to the specific Act and the facts with relation to the industry to be controlled, the Court says:

"The real question comes to this: May the state, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way *heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents?*"

In the case at bar, however, the judicial history of this industry and the Standard Oil Company's connection with the industry for more than half a century shows an actual, continuous, present, and unrelenting purpose on the part of the Standard Oil Company and other large companies engaged in the industry to destroy competition and monopolize the trade by the very trade practice condemned in Section 8 of this Act.

The report of the United States Senate Committee, already referred to—the numerous decisions of this Court and of the Supreme Court of Tennessee—the recent litigation in the State of Tennessee, hereinbefore referred to—the Governor's message to the Legislature and the preamble to this Act, all establish the fact of the evil complained of and the necessity of such legislation as that provided in this section of the Act.

We have hereinbefore set out the report of the Congressional Committee recommending the passage of the Clayton Anti-Trust Act, the second section of which provides as follows:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price *between different purchasers of commodities*, which commodities are sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, *where the effect* of such discrimination may be to substantially lessen competition."

The committee's report shows that the evil practice of the Standard Oil Company in rebating and in discriminating in its prices was one of the things that made necessary this Federal legislation.

In other words, in the Fairmount Creamery case the Act bore no reasonable relation to any actual evil existing in the trade sought to be regulated; whereas the Act we are now dealing with bears a very essential relation to a long recognized evil that both the State and Federal governments have been attempting to regulate and control.

In the case of *Crescent Cotton Oil Company v. Mississippi*, 257 U. S., 129, this Court sustained the validity of an Act of the General Assembly of Mississippi prohibiting manufacturers of cotton seed oil or cotton seed meal from doing certain lines of local business, and especially from owning and operating cotton gins in the State of Mississippi. This Act was attacked by a manufacturer of cotton seed oil that owned and operated two cotton gins. It made the same insistence as that made here: that it was the owner of private property and that it had the right to own and use that property under the protection of the Fourteenth Amendment to the Constitution. It was insisted that it was impractical to purchase its cotton seed from other ginners or brokers, and that it was necessary to own its own gin in the proper operation of its business.

The Court said:

"Where, as we have found in this case, a foreign corporation has no Federal right to continue to do busi-

ness in a state, and where, as here, no contract right is involved, and there is no employment by the Federal Government, it is the settled law that a state may impose conditions, in its discretion, upon the right of such a corporation to do business within the state, even to the extent of excluding it altogether. Horn Silver Min. Co. v. New York, 143 U. S., 305; 36 L. Ed., 164; 4 Inter. Com. Rep., 57; 12 Sup. Ct. Rep., 402; Baltic Min. Co. v. Massachusetts, 231 U. S., 68, 83; 53 L. Ed., 127, 133; 34 Sup. Ct. Rep., 15, and cases cited. And in such case the inherent difference between corporations and natural persons is sufficient to sustain any classification making restrictions applicable to corporations only. Hammond Packing Co. v. Arkansas, 212 U. S., 322, 343, 344; 53 L. Ed., 530, 541, 542; 29 Sup. Ct. Rep., 370; Baltic Min. Co. v. Massachusetts, *supra*. And see Ft. Smith Lumber Co. v. Arkansas, 251 U. S., 532, 533; 64 L. Ed., 396, 398; 40 Sup. Ct. Rep., 304; American Sugar Ref. Co. v. Louisiana, 179 U. S., 89; 45 L. Ed., 102; 21 Sup. Ct. Rep., 128; W. W. Cargill Co. v. Minnesota, 180 U. S., 452; 45 L. Ed., 619; 21 Sup. Ct. Rep., 423.

"This would be sufficient to dispose of this second contention, but we may add that the law assailed was enacted by the state in the exercise of its police power, to prevent a practice conceived to be promotive of monopoly, with its attendant evils. It is clearly settled that any classification adopted by a state in the exercise of this power which has a reasonable basis, and is therefore not arbitrary, will be sustained against an attack based upon the equal protection of the law clause of the Fourteenth Amendment, and also that every state of facts sufficient to sustain such classification which can be reasonably conceived of as having existed when the law was enacted will be assumed. Lindsley v. Natural Carbonic Gas Co., 220 U. S., 61; 55 L. Ed., 369; 31 Sup. Ct. Rep., 357; Ann. Cas., 1912C, 160, and cases cited; Rast v. Van Denman & L. Co., 240 U. S., 342; 60 L. Ed., 679; L. R. A., 1917A, 421; 36 Sup. Ct. Rep., 370; Ann. Cas., 1917B, 455."

In the case of Purity Extract Co. v. Lynch, 226 U. S., 197, the Court held an Act of the State of Mississippi valid, prohibiting the sale of non-intoxicating soft drinks. It could not be denied that the owner of these soft drinks had the right under the Constitution to own and sell this property. The state, on the other hand, in the exercise of its police power, had the right to prohibit and prevent the sale of intoxicating liquors. The General Assembly of the state in its wisdom concluded that the sale of certain non-intoxicating liquors could be used as a subterfuge to prevent the full operation of the prohibition against the sale of intoxicating liquors, and therefore, in order to aid in the enforcement of its prohibition against the liquor traffic, it sought also to prevent the sale of the harmless beverages referred to, and the Court sustained this as a proper exercise of police power, and, among other things, said:

> "It is also well established that, when a state exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. Booth v. Illinois, 184 U. S., 425; 46 L. Ed., 623; 22 Sup. Ct. Rep., 425; Otis v. Parker, 187 U. S., 606; 47 L. Ed., 323; 23 Sup. Ct. Rep., 168; Ah Sin v. Wittman, 198 U. S., 500, 504; 49 L. Ed., 1142, 1144; 24 Sup. Ct. Rep., 756; New York, ex rel., Silz v. Hesterberg, 211 U. S., 31; 53 L. Ed., 75; 29 Sup. Ct. Rep., 10; Murphy v. California, 225 U. S., 623; 56 L. Ed., 1229; 32 Sup. Ct. Rep., 697. With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment had no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been tran-

scended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the Legislature—a notion foreign to our constitutional system."

And so in the case at bar. The General Assembly trying this Act, seeks to remedy the evils and dangers threatening the gasoline industry of this state, and in order to prevent the destruction of competition has prohibited (a) rebating and price cutting and (b) discrimination between purchasers in different sections of the state.

THE PROVISION WITH REFERENCE TO DIFFERENTIALS.

The following provision of Section 8 is valid:

> "And provided further, that dealers shall maintain proper differentials between wholesale and retail prices." (R., p. 18, pp. 78-79 herein.)

This, it will be observed, follows immediately the provision in Section 8 against rebating and discrimination.

This is not a price-fixing provision.

As far as this provision is concerned, the dealer is perfectly free to fix any price he may desire. He may not, however, make his retail and wholesale prices the same.

One of the methods in use by the Standard Oil Company and other large dealers in Tennessee to destroy small competitors was the practice of selling without any differential between retail and wholesale prices. (R., p. 15.)

It is simply another form of price cutting used by these dealers in order to destroy competition.

This is shown not only by the condition of the trade in Tennessee, as hereinbefore set out, but by the opinions of this Court in numerous cases dealing with the conduct of this trade and the various Standard Oil Companies. It is also shown by the report of the Senate Committee and by the Congressional Committee with reference to the Clayton Anti-Trust Act.

Section 9 provides that the Attorney General of the state, or an assistant to be designated by him, shall assist in the enforcement of the Act and shall represent the company in all proceedings with reference thereto. (R., p. 16, p. 79 herein.)

Section 10 provides for a small annual tax on the dealers securing permits under the provision of the Act. (R., p. 20, p. 80 herein.)

Section 11 clearly defines the term "gasoline" within the meaning of the Act. (R., p. 20, p. 80 herein.)

Section 12 provides, as hereinbefore stated, that if any section or provision of the Act shall be held invalid, this shall not affect the validity of other sections or provisions thereof. (R., p. 20, p. 80 herein.)

The foregoing severable provisions of the Act are valid and, without regard to the price-fixing provisions, should be sustained.

IN CONCLUSION.

Therefore, for the reasons stated, it is respectfully submitted:

1. That the Act of the General Assembly of the State of Tennessee, challenged and complained of in this cause, is a valid, proper, and constitutional exercise of the police power of the state, designed and intended to regulate, within the state, the gasoline industry affected with the public interest, and to prevent monopoly and extortion in the sale and distribution, within said state, of a commodity devoted to the public use, and affecting, directly and indirectly, all the people of Tennessee.

2. That even if the price-fixing provisions of said Act should be held to be invalid, nevertheless other severable and distinct provisions of said Act should be sustained and enforced, particularly the provisions relating (a) to the publication of prices by gasoline dealers and filing same with the Department of Finance and Taxation; (b) the issuance of permits to gasoline dealers; (c) prohibiting rebates; (d) prohibiting discrimination; (e) for the collection and publication of data by the Finance Commission with reference to prices and conditions in the industry; (f) providing penalties for violation of the several provisions of the Act thus designated; and (g) providing for judicial review of the orders of the Commission.

Respectfully submitted,

L. D. SMITH,
Attorney General of Tennessee.

J. J. LYNCH,
H. N. LEECH,
CHARLES T. CATES, JR.,
Attorneys for Appellants.

APPENDIX.

CHAPTER 22 OF THE ACTS OF 1927.

SENATE BILL NO. 282.

(By McKnight, Wiggs and Miller.)

AN ACT to regulate the gasoline industry; to regulate the fixing and charging of prices of gasoline and prescribing a method for determining at what prices gasoline dealers may sell gasoline; to prohibit rebate and discrimination; to create and establish a Division of the Department of Finance and Taxation to be known as the Division of Motors and Motor Fuels, fixing the duties of the Commissioner of Finance and Taxation and of the Superintendent of such Division with respect to the regulation of sale prices of gasoline; to provide for the issuance of permits to gasoline dealers under rules and regulations prescribed by the Division of Motors and Motor Fuels; to provide penalties for the violation of the Act; to levy and to collect an additional tax on gasoline dealers; and to authorize a judicial review of the orders of the Division of Motors and Motor Fuels.

SEC. 1. Whereas, Gasoline is now in general use as a motor fuel, in both public and private transportation, and is necessary in carrying on the commerce of the people of this State, and

Whereas, the business of selling and marketing gasoline has become demoralized because of the attempt on the part of some dealers to monopolize the business and destroy competition, and because of the unfair and improper practices in the trade, it has become necessary for the State to control and regulate the business of selling and marketing gasoline in order to prevent the destruction of competition and to prevent extortionate prices and to preserve both public and private commerce and transportation,

It is therefore hereby declared that the sale and marketing of gasoline in this State is impressed with public use,

Therefore, Be it enacted by the General Assembly of the State of Tennessee, That there is hereby established a Division of the Department of Finance and Taxation to be known as the Division of Motors and Motor Fuels, which said Division shall be in charge of a Superintendent to be

named and appointed as other Superintendents of Divisions of the Department of Finance and Taxation are provided by law.

SEC. 2. *Be it further enacted,* That it shall be the duty of the Commissioner of Finance and Taxation to require the Division of Motors and Motor Fuels, through the Superintendent and other employees of said Division, to make investigations and to collect and record data concerning the manufacture and sale of gasoline; the cost incident to the refining processes at the refineries to the dealers in Tennessee and elsewhere, freight rates, differentials in prices to the wholesale dealer and the retail dealer; the cost and expense incident to the sale of gasoline; the methods employed by manufacturers and dealers in the distribution of gasoline to consumers, and such other data and information as will or might be material in ascertaining and determining what prices would be fair and reasonable to be paid for gasoline by wholesale dealers, retail dealers and consumers. All such data and information shall be available for use to the Commissioner and the Division aforesaid in the regulation of prices at which gasoline may be sold in the State of Tennessee, and shall be available for the inspection and information of the public, and the said Commissioner is authorized, when deemed necessary, to make public by publication or otherwise the information secured hereunder. It shall be the duty of the Superintendent of the Division of Motors and Motor Fuels to issue permits to dealers, subject to the approval of the Commissioner of Finance and Taxation, authorizing the sale by wholesale or retail of gasoline in this State at prices fixed and determined as hereinafter provided, and to perform such other duties as may be prescribed by subsequent sections of this Act.

SEC. 3. *Be it further enacted,* That it shall be unlawful for any person, firm or corporation, to engage in the sale of gasoline in intra-state commerce in this State, either at wholesale or retail, without first having obtained a permit to do such business, signed by the Superintendent of the Division of Motors and Motor Fuels and approved by the Commissioner of Finance and Taxation, and no per-

mit shall be issued to any firm, person, or corporation to engage in the sale of gasoline in intra-state commerce unless and until such dealer shall make application therefor in accordance with the regulations of this Act, and in compliance with all the requirements and provisions hereof.

SEC. 4. *Be it further enacted*, That every person, firm, or corporation, desiring to engage in the sale of gasoline in intra-state commerce in this State, either at wholesale or retail, shall make application to the Superintendent of the Division of Motors and Motor Fuels therefor, and shall be set out in said application the following information, to-wit:

(a) Whether he proposes to do a wholesale or retail business, or both; and if a wholesale business the number and location of the different places at which he intends to operate; and if a retail business the number and location of the different service stations and pumps he intends to operate.

(b) If the applicant is an individual, give his name and address; if a partnership, the names and addresses of the members of the firm, the style of the firm and the place or places at which it is intended to do business; if a domestic corporation the location of its principal office and the names and addresses of its principal officers; if a foreign corporation the State of its incorporation, its principal place of business in the State where chartered, and its principal place of business in this State, as well as the names and addresses of its principal officers, and the name and address of its principal agent or agents in this State.

(c) The price or prices at which said dealer is at the time of the application selling gasoline at the different locations where he sells the same.

(d) The cost price of such gasoline to said dealer, including the refinery cost, transportation cost, taxes and inspection fees, the cost of distribution and such other costs and expense as may enter into the price at which it is proposed to sell such gasoline.

(e) The price or prices at which he proposes to sell gasoline as a wholesaler and as a retailer.

(f) Such other information as may be prescribed by the Superintendent.

SEC. 5. *Be it further enacted,* That it shall be the duty of the Superintendent of the Division of Motors and Motor Fuels to take into consideration all the information furnished as provided by the previous section, and if the price or prices at which said applicant proposes to sell gasoline does not exceed a reasonable profit to the dealer, after figuring the cost to the dealer, freight and expenses in marketing, and making a proper differential between the wholesale and retail prices, and the same is in the interest of the public, to issue to said applicant a permit authorizing him to sell gasoline in the State of Tennessee; provided, however, said permit must first be approved by the Commissioner of Finance and Taxation.

If, however, the price at which any applicant proposes to sell gasoline in Tennessee shall be by such Superintendent of Motors and Motor Fuels deemed unfair and unreasonable in view of the information, which by the previous sections is required to be taken into consideration, then it shall be his duty to fix and name a price or prices at which gasoline may be sold by the said applicant, and to notify said applicant thereof in writing stating the reasons for his action in this respect. In the event the applicant is dissatisfied with the action of the Superintendent it shall be his duty, before engaging in the sale of gasoline in this State, to notify the Commissioner of Finance and Taxation in writing, within ten days after receiving notice of the action of the Superintendent, of his dissatisfaction, and shall in said notice set forth specifically the objections which he has to the ruling of the Superintendent and the reasons upon which he relies for a review or correction of the action of the Superintendent, and shall demand of the Commissioner that he fix a time and place at which the Commissioner will hear proof, limited to the grounds and reasons assigned by the applicant for his dissatisfaction to the action of the Superintendent. Thereupon it shall be the duty of the Commissioner to fix a time and place and afford to the applicant an opportunity to be heard with respect to the grounds of his complaint by the introduction of proof, if desired. The time and place of such hearing will be named by the Commissioner, which shall not be more than

five days from the date of the filing of the complaint with him, notice of such time and place to be given to the applicant. It shall likewise be the duty of the Commissioner to give to the Governor and to the Attorney-General of the State, and to all other applicants for permits to whom permits have not been issued at the time, notice of the complaint of any applicant, and the time and place at which such said complaint will be heard. Any other person interested in the price of gasoline, either as a dealer or consumer, may likewise be heard upon the complaint of any applicant under such rules and regulations as the Commissioner may prescribe, provided, that said Commissioner may give notice by publication in daily newspapers published in at least two of the four larger cities of the State. After such hearing the Commissioner shall decide, upon taking into consideration the facts and information hereinbefore referred to, and such other facts as may be relevant, whether or not a permit will be issued to the applicant to sell gasoline at the price or prices, proposed, or if not at what price a permit will be issued, giving notice to the applicant thereof.

Any applicant aggrieved by the action of the Commissioner may file a petition for the purpose of having said action reviewed in any Chancery Court or Circuit Court of Davidson County, Tennessee, provided notice of his intention to file a petition for review has been served on the Commissioner five days in advance of filing. Upon receiving notice of the intention of an applicant to file a petition for review, as aforesaid, it shall then be the duty of the Commissioner to cause all of the proceedings had before him on the application to be reduced in writing, and verified by him as being correct, so that when such petition has been filed and notice thereof served upon him, (and the petitioner shall cause such notice to be served) the Commissioner shall, within five days, then file with the Clerk of the Court where said suit is brought a transcript of all the proceedings had before him, and which is sought to be reviewed, and said transcript duly verified shall constitute all the record, and shall be the basis of the action of the Court of Review; provided, that the court may, in its discretion, upon

good cause shown, allow either side to file additional proof. No order of the Commissioner shall be superseded by said Court before final hearing, unless after five days' notice to the Commissioner it shall appear to the Court at a regular hearing, or at Chambers upon proper motion, that irreparable injury will result to the petitioner on the continuance of said order, and that no irreparable injury will result from a dissolution or modification thereof; in such event the Court may, in its discretion, either supersede or modify said order in such manner and upon such conditions and terms as may appear to be proper.

SEC. 6. *Be it further enacted,* That it shall be unlawful for any person, firm or corporation, engaged in selling gasoline in Tennessee, at either wholesale or retail, to change his price or prices without applying for and obtaining the consent of the Superintendent of the Division of Motors and Motor Fuels, approved by the Commissioner of Finance and Taxation. Any dealer desiring to change his price shall file his application with the Commissioner at least five days before the proposed change in prices, and shall set out in his said application the reasons for said change, and shall show:

(a) That conditions exist, or have arisen justifying such changes and what such conditions are, which show that the new price to be charged is not unfair to the public and not unfair to other dealers.

In determining whether such change shall be permitted the same procedure shall be had as hereinbefore prescribed with respect to the issuance of the original permit, and the same remedies shall apply to any one aggrieved at the action of the Commissioner as is afforded to one aggrieved by the action of the Commissioner upon an original application, including the right of review to any Chancery or Circuit Court of Davidson County, Tennessee.

SEC. 7. *Be it further enacted,* That either the Attorney-General of the State, or any other person interested, whether as dealer or consumer, may file with the Superintendent of the Division of Motors and Motor Fuels objection to any price or prices being maintained by any dealer as herein defined, and may show in his petition setting up said ob-

jection that the price or prices are extortionate or unfair to the public, or to any other dealer, as above set out, and after due notice to such dealer, and after hearing proof in the manner and form hereinbefore prescribed for the procedure of the Commissioner of Finance and Taxation, and in such manner as will give both sides proper opportunity to be heard, the Commissioner shall, if the facts warrant such action, issue an order to the said dealer whose prices are complained of restraining him from selling at the price complained of, or the Commissioner may make in said order any such conditions or limitations as under the facts will do justice to said dealer and protect the public and legitimate competition, the Commissioner at all times taking into consideration those facts and elements hereinbefore set forth as constituting a fair and reasonable price in the interest of the public. Any other person aggrieved at the action of the Commissioner in this respect shall be entitled to the same right of objection and review by the Courts, and under the same procedure as is hereinbefore provided in the case of original applications for permits.

SEC. 8. *Be it further enacted,* That it shall be unlawful for any person, firm or corporation, engaged in intra-state wholesale or retail gasoline business in Tennessee to grant any rebate to any customer or purchaser of said gasoline from any dealer, or to sell to any such purchaser or customer at a price different from that filed with the Commissioner of Finance and Taxation, or to grant any concession or gratuity, directly or indirectly to any customer or purchaser for the purpose of inducing said purchaser or customer of said dealer to purchase, use or handle the gasoline of said dealer; and it shall be unlawful for any person, firm or corporation engaged in intra-state wholesale or retail sale of gasoline in Tennessee to discriminate against or in favor of any customer or purchaser of said dealer by selling at a different price to said purchasers in different localities in Tennessee, or to different purchasers in the same locality, provided the dealer may take into consideration the difference in freight rates to different localities, and provided further, that dealers shall maintain proper differentials between wholesale and retail prices as such differen-

tials may be fixed and determined by the Superintendent of the Division of Motors and Motor Fuels with the approval of the Commissioner of Finance and Taxation. And it shall also be unlawful for any person, firm or corporation to bring about an unreasonable, or unfair increase in the refinery prices of gasoline to dealers in Tennessee, or who shall aid or conspire, combine or confederate with others in aiding to bring about such unreasonable and unfair increase in such refinery price.

No firm, person or corporation who violates any of the provisions of this Section shall be entitled to a permit to engage in the wholesale or retail or intra-state sale of gasoline. The Governor, the Attorney-General of the State, or any person interested in the price of gasoline, whether dealer or consumer, may upon petition file with the Commissioner of Finance and Taxation complaint against any person, firm or corporation as being guilty of a violation of the provisions of this Section, and if such complaint be filed with the Commissioner, properly sworn to and verified, it shall be the duty of the Commissioner to give notice to the dealer whose conduct is complained of and afford a hearing upon notice to all persons concerned. If the dealer complained of is found to be guilty of the charges by the Commissioner, then it shall be his duty to refuse to issue or cancel his permit. Any investigation had by the Commissioner under the provisions of this Section shall be held and conducted in the same manner as hereinbefore provided for complaints at the action of the Commissioner upon original applications, and the same remedies shall be afforded to those aggrieved as are hereinbefore afforded to persons aggrieved by the action of the Commissioner with respect to original applications for permits.

SEC. 9. *Be it further enacted,* That the Attorney-General of the State, or some assistant Attorney-General designated by him for said duty, shall be the law officer of the Division of Motors and Motor Fuels and the Commissioner of Finance and Taxation and shall represent the public in all proceedings before the said Division or Department, and in all judicial proceedings growing out of the orders of said Department and Division.

SEC. 10. *Be it further enacted,* That before any person, firm or corporation shall obtain a permit to deal in gasoline, either at wholesale or retail, in this State, he shall pay a special permit tax which shall accompany the application for permit as follows:

(a) For each place so conducted for the wholesale marketing of gasoline $10.00 per annum.

(b) For each retail station or curb pump $1.00 per annum.

This tax shall be in addition to all other license, inspection or ad valorem taxes otherwise provided by law, and shall be kept as a special maintenance fund to aid in defraying the expenses of the Motors and Motor Fuel Division of the Department of Finance and Taxation.

SEC. 11. *Be it further enacted,* That the term "gasoline" as used in this Act means and includes:

(a) The volatile substance produced from petroleum, natural gas, oil shale or coal heretofore sold under the name of gasoline.

(b) Any volatile substance or product less than 112 Fahrenheit Flash Test when tested in a manner approved by the U. S. Bureau of Mines derived wholly or in part from petroleum, natural gas, oil shale or coal.

(c) Benzol and/or any other volatile substance used wholly or in combination with gasoline as a liquid fuel.

SEC. 12. *Be it further enacted,* That if any section or provision of this Act shall be held to be invalid this shall not affect the validity of other sections or provisions hereof.

SEC. 13. *Be it further enacted,* That this Act take effect from and after its passage, the public welfare requiring it.

Passed April 5, 1927.

HENRY H. HORTON,
Speaker of the Senate.

SELDEN MAIDEN,
Speaker of the House of Representatives.

Approved: April 8, 1927.

AUSTIN PEAY,
Governor.

Office Supreme Court, U. S.
FILED
OCT 25 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 64

ALBERT S. WILLIAMS, Commissioner of Finance of the State of Tennessee, L. D. SMITH, Attorney General of the State of Tennessee, and R. M. ATKINSON, District Attorney General,

Appellants.

vs.

STANDARD OIL COMPANY OF LOUISIANA,

Appellee.

BRIEF FOR APPELLEE

JOHN W. DAVIS,
H. D. MINOR,
For Appellee.

1001

INDEX

	Page
Act in Question	2- 6
Act Invalid Because Effective at Once	60
Act Violates XIV Amendment	13- 17
"Affected with a Public Interest"	17- 35
Argument	13- 76
Brief	8- 12
Differential, Protection of	43
Due Process of Law	57
Elision of Invalid Portions of Act	66- 69
Foreign Corporations	44- 48
Freedom of Contract Violated	15
Gasoline Not Affected with Public Interest	31
Gasoline Sales—How Made	7
Impairment of Contracts	57
"Impressed with a Public Use"	17, 18
Injunction Proper Remedy	70- 75
Legislative Declaration That Business Is Affected with Public Interest Not Binding	34
Monopoly	50- 56
Ouster of Plaintiff's Predecessor	69
Price Regulation Unconstitutional	38
Protection of Middlemen	43
State Without Right to Fix Prices	35- 38
Title of Act	55, 63
Unlawful (Alleged) Practices Do Not Justify Denial of Constitutional Rights	37- 48

TABLE OF CASES

Page

Adams v. Tanner, 244 U. S. 594 50

Air Way Co. v. Day, 266 U. S. 71 45

Ala. Transp. Co. v. Doyle, 210 Fed. 181 60

Allnut v. Inglis, 12 East 527 27

Brass v. North Dakota, 153 U. S. 391 20

Budd v. New York, 143 N. Y. 517 20

Burns Baking Co. v. Bryan, 264 U. S. 504 36

Capital Trust Co. v. Calhoun, 250 U. S. 208 30

Connally v. Construction Co., 269 U. S. 385 ..... 11, 58

Constitution of Tenn., Art. II, Sec. 17 63

Cotting v. Godard, 183 U. S. 79 ..... 9, 33, 38, 40, 42, 49

Crescent Oil Co. v. Miss. 257 U. S. 129 30

Donnell v. Herring, 208 U. S. 273 70

Ex-Parte Young, 207 U. S. 123 ..... 12, 73

Fairmount Creamery v. Minn., 274 U. S. 1 ..... 8, 9, 13, 24

Fidelity Co. v. Tafoya, 270 U. S. 426 ..... 10, 46

Frost v. Ry. Commission, 271 U. S. 594 ..... 38, 46, 48

German All. Ins. Co. v. Lewis, 233 U. S. 412 ..... 20, 22

Green v. Victor Co., 24 Fed. 380 70

Hanover Ins. Co. v. Carr, 272 U. S. 499 ..... 10, 45

TABLE OF CASES—(Continued)

Page

Harbison v. Iron Co., 103 Tenn. 429 14

Harrison v. Railroad, 232 U. S. 318 ..... 12, 73

Holder Hwd. Co. v. Boyle, 263 Fed. Rep. 137 37

Howard v. I. C. R. Co., 207 U. S. 463 ..... 12, 61, 62

Ill. Cent. v. McKendree, 206 U. S. 514 62

Interstate Commerce Act., Sec. I, Par. 3 20

Jones v. Portland, 245 U. S. 217 18

Lochner v. New York, 198 U. S. 59 ..... 8, 16

Louisville Gas Co. v. Coleman, 72 L. Ed. 488 17

McFarland v. Sugar Ref. Co., 241 U. S. 79 ..... 9, 10, 38, 50

Munn. v. Illinois, 94 U. S. 131 ..... 18, 19

Northern Securities Co. v. U. S. 193 U. S. 400 42

Okla. Gas. Co. v. Okla., 261 U. S. 290 28

Okla. Gin Co. v. State, 252 U. S. 339 73

Okla. Oper. Co. v. Love, 252 U. S. 338 ..... 73, 74

Palmetto Ins. Co. v. Conn., 272 U. S. 304 46

Parker v. Hotel Co., 96 Tenn. 278 70

Pressly v. State, 114 Tenn. 534 ..... 12, 72

Quaker City Co. v. Penn., 72 L. Ed. 607 ..... 9, 10, 34, 42, 45

Real Silk Co. v. Portland, 268 U. S. 336 34

Ribink v. McBride, 72 L. Ed. 614 ..... 8, 13, 26

TABLE OF CASES—(Continued)

Page

Schlesinger v. Wisconsin, 270 U. S. 240 41

Security Ins. Co. v. Prewitt, 202 U. S. 246 47

Stafford v. Wallace, 258 U. S. 735 ..... 20, 29

State v. St. Oil Co., 120 Tenn. 86 ..... 51, 69

St. Louis R. Co. v. Ark., 260 U. S. 348 34

Stand. Oil Co. v. Tenn., 217 U. S. 413 ..... 51, 69

Tenn. Code, Sec. (4596) 6537 ..... 12, 71

Terminal Taxicab Co. v. Kutz, 241 U. S. 252 30

Trade Mark Cases, 100 U. S. 82 63

Tyson v. Banton, 273 U. S. 418 ..... 8, 9, 11, 12, 13, 15, 24, 33, 40, 56

U. S. Constitution 10, 13

U. S. v. Cohen Co., 255 U. S. 88 58

U. S. v. Freight Assn., 166 U. S. 320 34

U. S. v. Reese, 92 U. S. 221 ..... 9, 40

Vanzant v. Waddel, 2 Yerg. 270 49

Van Dyke v. Geary, 244 U. S. 39 28

W. U. Tel. Co. v. Kansas, 217 U. S. 1 47

Weller v. New York, 268 U. S. 319 ..... 61, 62

Williams v. Fears, 179 U. S. 270 14

Wolff Packing Co. v. Court, 262 U. S. 522 ..... 8, 17, 18, 23

Wolff Packing Co. v. Court, 267 U. S. 552 ..... 8, 22

Yeiser v. Dysant, 267 U. S. 538 30

Yuille v. Mobile, 3 Ala. (N. S.) 140 ..... 35, 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 64

ALBERT S. WILLIAMS, Commissioner of Finance of the State of Tennessee, L. D. SMITH, Attorney General of the State of Tennessee, and R. M. ATKINSON, District Attorney General,

Appellants,

vs.

STANDARD OIL COMPANY OF LOUISIANA,

Appellee.

BRIEF FOR APPELLEE

The Legislature of Tennessee having passed, in April, 1927, an act providing for the fixing of gasoline prices in Tennessee (pp. 16-23), the Standard Oil Company of Louisiana filed its bill (pp. 2-15) in the United States District Court at Nashville against the State officials charged with the enforcement of the act to enjoin them from enforcing it. Temporary restraining order was granted at once and, after answers filed by all the defendants, plaintiff's application for a temporary

injunction was heard by a statutory court of three federal judges. That court rendered an opinion (pp. 123-128) holding the act unconstitutional because in violation of the 14th Amendment and granted the preliminary injunction (p. 129), whereupon this appeal was prosecuted by the defendants.

For convenience, the parties will generally be referred to as in the court below—plaintiff and defendants. All italics are ours unless otherwise indicated.

Jurisdiction

The bill disclosed diversity of citizenship and also questions arising under the federal constitution. It shows that more than the sum of $3,000, exclusive of interest and costs, is involved.

The Act in Question

Although the Act is copied in the record (pp. 16-23), a brief digest of it here may be useful.

Sec. 1. A bureau is established to be known as the Division of Motors and Motor Fuels to be in charge of a superintendent.

Sec. 2. This Superintendent shall make an investigation and collect and record data as to the manufacture and sale of gasoline, the cost of refinery process, freight rates, "*differentials and prices to the wholesale dealer and the retail dealer,*" expense incident to the sale of gasoline, methods of distribution by manufacturers and dealers, and such other information as will be material in ascer-

taining what price will be "fair and reasonable to be paid for gasoline *by wholesale dealers, retail dealers* and consumers." It is his duty to issue permits to dealers, subject to the approval of the Commissioner of Finance and Taxation, authorizing the sale at wholesale or retail of gasoline in Tennessee "at prices fixed and determined as hereinafter provided."

Sec. 3. It is made unlawful for any person to engage in the sale of gasoline in intrastate commerce in Tennessee without first having a permit and no permit shall issue except upon application therefor under regulations provided in the act and "in compliance with the requirements and provisions hereof."

Sec. 4. Every person desiring to deal in gasoline in intrastate commerce must make application to the superintendent setting out:

(a) Whether he proposes to sell at wholesale or retail or both; the number and location of his places of business and the number of pumps to be operated.

(b) Information as to the name and address of the applicant, his principal office, etc.

(c) The price at which the applicant is selling gasoline at his different locations.

(d) "The cost price of such gasoline to said dealer, including the refinery cost, transportation

cost, taxes and inspection fees, the cost of distribution and such other costs and expenses as may enter into the price at which it is proposed to sell such gasoline."

(e) The price or prices at which the applicant proposes to sell.

(f) Such other information as the superintendent may prescribe.

Sec. 5. It is made the duty of the Superintendent to take into consideration all of the information acquired under the preceding sections and, if the price at which the applicant proposes to sell "does not exceed a reasonable profit to the dealer after figuring the cost to the dealer, freight and expenses in marketing *and making a proper differential between the wholesale and retail prices,* and the same is in the interest of the public," to issue the permit. If, however, the Superintendent does not approve such prices, "then it shall be his duty to fix and name a price at which gasoline may be sold by the said applicant" and to notify the applicant in writing. If the latter is dissatisfied, he may have the action of the superintendent reviewed by the Commissioner, and, if still dissatisfied, have the Commissioner's action reviewed in the courts.

Sec. 6. It is made unlawful for any person "engaged in selling gasoline in Tennessee at either wholesale or retail" to change his prices without the consent of the Superintendent. This consent can be had not earlier than five days after the

application is filed and, in determining whether the change shall be permitted, the same considerations shall govern and the same right of review is given.

Sec. 7. The Attorney General "or any other person interested, "*whether as dealer* or as consumer," may file with the Superintendent objections to any price or prices maintained by any dealer on the ground that such prices "are exorbitant or unfair to the public *or to any other dealer,*" whereupon proceedings akin to those already outlined are had.

Sec. 8. It is made unlawful for any person engaged in the intrastate sale of gasoline at wholesale or retail in Tennessee to grant "any rebate to any customer or purchaser of said gasoline from any dealer or to sell any such purchaser or customer at a price different from that filed with the Commissioner of Finance and Taxation, or to grant any concession or gratuity, directly or indirectly, to any purchaser or customer for the purpose of inducing said purchaser or customer of said dealer to purchase, use or handle the gasoline of said dealer." It is also made unlawful to discriminate against or in favor of any customer or purchaser of said dealer "by selling at a different price to said purchasers in different localities in Tennessee or to different purchasers in the same locality," except so far as the differences in freight rates affect the price. It is also made unlawful for any person "to bring about an unlawful or unreasonable increase in the refinery price of gasoline to

dealers in Tennessee.'' No person violating the provisions of this section shall be entitled to a permit and the Governor, the Attorney General or any other person interested, *whether dealer or consumer,* may file a complaint with the Commissioner against such person, whereupon proceedings may be had similar to those already outlined.

Sec. 9. The Attorney General or some one of his assistants is made the law officer of said Division who shall represent the public in all proceedings before the Division or growing out of its orders.

Sec. 10. Before obtaining a permit to deal in gasoline, every person must pay the special permit tax of $10.00 on each place conducted for the wholesale marketing of gasoline and of $1.00 for every service station—these taxes to be in addition to all other taxes.

Sec. 11. This defines the term gasoline ''as used in this act.''

Sec. 12. If any section or provision of this act is held invalid, the validity of the remaining sections shall not be affected.

Sec. 13. The act takes effect from and after its passage.

The act was approved by the Governor April 8, 1927. The language italicized indicates a purpose to protect *the middleman* rather than the public.

How Gasoline Is Sold

It is important to note how gasoline sales are made—as outlined in the bill. There are three kinds of sales: tankcar sales, tankwagon sales and sales from service stations. The first embraces sales by the refinery or manufacturer and delivery is made in tankcar on tracks serving the purchaser's plant. These sales are almost invariably interstate. The second embraces sales from tankwagons which get their supply from the bulk station of the seller in Tennessee. Such sales are made by middlemen and are usually, though not always or necessarily, to a retail dealer. The third class comprehends sales by the retail dealer (a middleman) to members of the consuming public.

Record, pp. 3, 68.

These facts are important as throwing light on what is meant in the act by protecting the differential. The middleman is concerned not so much with the price the consuming public pays as with the margin between the price he pays and the price at which he sells. The protection of this margin must often occur at the expense of the ultimate consumer, and, as we shall argue later herein (infra, p. 43), renders the act void.

BRIEF

1. The act in question is a violation of the Fourteenth Amendment in that it deprives the plaintiff of its freedom of contract.

Tyson v. Banton, 273 U. S. 418.
Fairmount Co. v. Minn., 274 U. S. 1.
Lochner v. New York, 198 U. S. 59.
Ribnik v. McBride, 72 L. Ed. 614.
Wolf Pack. Co. v. Court, 262 U. S. 522.
Ibid., 267 U. S. 552.

2. The business of selling gasoline is not one affected with a public interest and, therefore, not subject to price regulation by the State.

Authorities *supra.*
Infra, pp. 31 et seq.

3. The attempt of the legislature to declare the business of selling gasoline one affected with a public interest is not effective for that question is a judicial one.

Tyson v. Banton, 273 U. S. 418.

4. Assuming for the purpose of argument that evils exist in the gasoline trade, those evils may not be cured save by legislation which comports with the Constitution and this price regulation is not of that character.

Tyson v. Banton, 273 U. S. 418.
Fairmount Creamery v. Minnesota, supra.

5. That price regulation is not and can not be a constitutional means of correcting the alleged evils in the gasoline business necessarily results from two propositions:

(a) The act is all embracing, including alike the large corporation which operates extensively and the small dealer who operates a single pump as an incident to his grocery store. If it were not so it would be invalid for partiality.

Cotting v. Godard, 183 U. S. 79.
McFarland v. Sugar Ref. Co., 241 U. S. 79.
Quaker City Cab Co. v. Penn., 72 L. Ed. 614.

(b) Being, of necessity, all embracing, the statute "fixes the retail prices as well where the evils are absent as where they are present" and "it is not permissible to enact a law which, in effect, spreads an all inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers may also be caught."

Tyson v. Banton, 273 U. S. 443.
Fairmount Cr. v. Minn., 274 U. S. 1.
U. S. v. Reese, 92 U. S. 221.

6. No case can be found in American jurisprudence which, in the absence of a war emergency, has sustained the right of the state to regulate the price at which an ordinary article of commerce may be sold.

Infra, p. 35 et seq.

7. The act is invalid because its purpose and effect is not merely to protect the price paid by

the consuming public but margins in favor of middlemen.

Infra, p. 43.

8. Alleged unlawful practices of a gasoline dealer in the conduct of its business can not defeat its right to maintain a bill in equity to restrain the threatened enforcement of a state statute to regulate its business which violates its rights under the Constitution. *Neither the piety nor the depravity of the persons affected by a statute can determine its constitutionality.*

McFarland v. Sugar Ref. Co., 241 U. S. 79.

9. Nor can the act be sustained on the theory that plaintiff is a foreign corporation and therefore subject to any condition the State may choose to name.

Hanover Ins. Co. v. Carr, 272 U. S. 499.
Fidelity Co. v. Tafoya, 270 U. S. 426.
Quaker City Co. v. Penn., 72 L. Ed. 614.

10. The act can not be sustained on the theory that it is necessary to prevent a monopoly and to protect competition. It does not protect but destroys competition and, assuming for purpose of argument only that a monopoly is threatened, price regulation is not the constitutional remedy.

Infra, pp. 50 et seq.

11. The act violates the provision of the Federal Constitution which prohibits any state from passing a law impairing the obligation of contracts.

U. S. Constitution, Article I, Sec. 10.

12. The act is unconstitutional in that it denies due process of law. It prescribes a duty which gasoline dealers must observe and makes the non-performance of the duty a criminal offense, yet states the duty in language so vague and obscure that one may not know its requirements.

Connally v. Construction Co., 269 U. S. 385.

13. The act denies due process for that, by its express terms, it took effect the moment it was signed by the Governor. No power was vested in any arm of the State to suspend the operation of the statute pending the performance of the conditions precedent which will necessarily require much time, during which the sale of gasoline is unlawful.

Infra, p. 60.

14. The decisions of the Federal Supreme Court, which have sustained legislation regulating the charges of elevator companies, insurance companies and the like are not applicable to the case at bar and are clearly distinguishable.

Infra, p. 18.

15. Nor do the decision of the Federal Supreme Court sustaining regulatory legislation, temporary in character and enacted to meet a war emergency, support legislation like that here involved.

Tyson v. Banton, 273 U. S. 437.

16. The act can not be saved by eliding the unconstitutional provisions for (1) every section is a part and parcel of the scheme of statutory regulation of prices and, therefore, violates the consti-

tutional guarantee of freedom of contract; (2) the sections sought to be saved by eliding others are not separable from such others; and (3) all the provisions of the act are so closely interwoven and so interdependent that it can not be said that the legislature would have passed any part of the act without the price regulation portion.

Infra, pp. 62 et seq.
Opinion below, Rec., p. 128.
Howard v. I. C. R. Co., 207 U. S. 501.

17. In Tennessee, "when the performance of any act is prohibited by statute and no penalty for the violation of such statute is imposed, the doing of such an act is misdemeanor," and is punishable at common law, i. e., by fine or imprisonment or both.

Opinion below, Rec., p. 124.
Tennessee Code of 1858, Sec. 4596.
Shannon's Code of Tennessee, Sec. 6437.
Pressly v. State, 114 Tenn. 534.

18. An injunction against the officers of the State who are charged with the enforcement of the act is the proper remedy.

Ex Parte Young, 207 U. S. 123.
Harrison v. Railroad, 232 U. S. 318.
Tyson v. Banton, 273 U. S. 418.

ARGUMENT

The court has had occasion so recently to consider the question of price regulation and has dealt with it so exhaustively that we feel a hesitancy in attempting to add anything to the discussion.

Tyson v. Banton, 273 U. S. 418.
Fairmount Co. v. Minn., 274 U. S. 1.
Ribnik v. McBride, 48 Sup. Ct. Rep. 545.

And we respectfully invite attention to the opinion of the court *a quo* in this case, found in the record at pp. 123-8, which deals clearly and forcefully with the questions here involved.

I.

This Act Violates the Fourteenth Amendment in That It Deprives Plaintiff of Its Freedom of Contract

The constitutional provisions applicable and their general meaning may here be stated.

> "Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."
> U. S. Constitution, Amendment XIV.

> "A corporation is a 'person' within the provision against deprivation of life, liberty, or

property 'without due process of law' (Turnpike Road Co. v. Sanford, 164 U. S. 578; Gulf Ry. v. Ellis, 165 U. S. 154; Dugger v. Insurance Co., 95 Tenn. 250); and it is a 'man' within the provision against deprivation of liberty or property otherwise than by 'the law of the land' (Railroad v. Harris, 99 Tenn. 705); hence, the defendant, which is a corporation, is entitled to the protection guaranteed by both provisions."

Harbison v. Iron Co., 103 Tenn. 427.

"The 'liberty' contemplated in each provision means not only the right of freedom from servitude, imprisonment, or physical restraint, but also the right to use one's faculties in all lawful ways, to live and work where he chooses, to pursue any lawful calling, vocation, trade or profession, to make all proper contracts in relation thereto, and to enjoy the legitimate fruits thereof. * * * 'In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, must be embraced the right to make all proper contracts in relation thereto.' Allgeyer v. Louisiana, 165 U. S. 591."

Harbison v. Iron Co., 103 Tenn. 430.
Williams v. Fears, 179 U. S. 270.

"The right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, State Freight Tax Case, 15 Wall. 232, 278, and as such, within the protection of the due process

of law clauses of the 5th and 14th Amendments."

Tyson v. Banton, 273 U. S. 429.

A more complete deprivation of the right of freedom of contract than this statute compels can hardly be conceived. A dealer in gasoline may not sell at all until he has a permit setting out the prices he may charge. He can get this permit only after making application and securing the approval thereof by the Superintendent and the Commissioner. If his prices do not suit them he must accept such prices as they dictate, subject to review in the courts, which of necessity must require much time. Even after he has obtained a permit his prices are liable to be upset on complaint of the Commissioner or any dealer or consumer. If occasion should arise for a change in price, he can make a change only after application to the Superintendent, for which much time is necessary. His prices must be uniform over the state save in so far as affected by freight rates. Local conditions or other considerations which might call for a difference in prices at different localities may not be considered. He can make no better price to quantity purchasers than to the smallest customer. If he operates in several localities, he cannot change his price in one without making a similar change in every other. If he is both a wholesaler and retailer, as is the case with many dealers, he must observe "reasonable" differentials—this, not for the protection of the consuming public but for the protection of other dealers at the expense of the

public. In short, freedom of contract, so far as prices are concerned, is completely taken away.

In Lochner v. New York, it was held that the New York Act limiting the time which employes in bakeries might work to a maximum of sixty hours a week and a maximum of ten hours in one day was an arbitrary interference with the freedom of contract guaranteed by the Fourteenth Amendment and could not be sustained as a valid exercise of the police power to protect the public health or the public welfare. In response to the state's claim of police power, the court said:

> "But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinet-maker, a dry goods clerk, a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family."
>
> Lochner v. New York, 198 U. S. 59.

> "The equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances * * * and that it applies to the exercise of all the powers of

the state which can affect an individual or his property."

Louisville Gas Co. v. Coleman, 72 L. Ed. 488.

Authorities Dealing With the Phrase "Affected With a Public Interest"

The difficulty, if not the impossibility, of furnishing a standard by which all cases may be determined has been recently adverted to—273 U. S. 430. In the Wolff Packing Co. case, the court divided into three classes those businesses which may be said to be affected with a public interest or "impressed with a public use": (1) Those carried on under authority of a public grant or privilege, like railroads and public utilities; (2) other occupations regarded as exceptional and recognized from earliest times as subject to regulation, like those of inn-keepers, grist mills and the like; and (3) those which, though not public in their nature, may fairly be said to have risen to be such and which "have come to hold such a peculiar relation to the public that the regulation is self-imposed upon them."

Wolff Packing Co. v. Court, 262 U. S. 522.

A review of the decided cases dealing with the subject is the only means by which this brief may be made helpful. It is important to note, at the outset, that the term "public use" in the connection above indicated has quite a different meaning from the same term as employed in statutes authorizing condemnation proceedings or the levy of taxes. Its use in the latter cases is admittedly one

of wider scope than when the same term is used to describe that which clothes a property or business "with a public use." For example, in Jones v. Portland, 245 U. S. 217, the city had established a public wood and coal yard and levied a tax for its maintenance and operation. The court held that such an enterprise was a public use which would justify the exercise of the power *of taxation,* but manifestly, as this Court has indicated, a different question would have been presented had the legislature undertaken to fix the charges of private individuals operating fuel yards.

Wolff Packing Co. v. Court, 262 U. S. 537.

Munn v. Illinois

This, a leading case, upheld the right of the state to regulate the charges of elevator companies. The basis of the decision was the fact that *the elevators were a part of the facilities for the common carriage of grain.* This is made quite plain by the opinion.

As is well known, there are three articles of commerce for the handling of which the ordinary depot facilities of common carriers are confessedly inadequate—live stock, grain and cotton—and the right of a carrier to delegate to a private corporation the duty of furnishing depot facilities for the receipt and forwarding of such articles of commerce has long been recognized by courts and legislatures alike. Grain elevators, stockyards and cotton compresses are, therefore, in effect a part of the facilities of the common carriers on whose

lines they lie and are subject to much the same regulation and control as the carriers themselves. The court was therefore dealing wholly with the price to be charged *by an agent of a common carrier for services rendered.* The case in no respect involved the right of the state to fix the price at which an ordinary dealer in commercial articles may sell his wares. Point is given to this by the following paragraph in the opinion of the Court:

> "We are also not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their Constitution in 1870, saw fit to make it the duty of the General Assembly to pass laws 'for the protection of producers, shippers and receivers of grain and product,' Art. XIII., Sec. 7; and by Sec. 5 of the same article to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same at any elevator to which it might be consigned, that could be reached by any track that was or could be used by such company, and that all railroad companies should permit connections to be made with their tracks, so that any public warehouse, etc., might be reached by the cars on their railroads."
>
> Munn v. Illinois, 94 U. S. 132.

All this is further borne out by the definition of "transportation" as expressed in the Interstate Commerce Act:

> "The term 'transportation' as used in this act shall include locomotives, cars, and other

vehicles, vessels and all instrumentalities and facilities of shipment of carriers *irrespective of the ownership of or of any contract, expressed or implied, for the use thereof,* and also services in connection with the receipt, delivery, *elevation,* and transfer . . . of property transported."

Interstate Commerce Act, Sec. 1, Par. 3.

The same consideration induced the holding in subsequent cases, conspicuously that of Budd v. New York, 143 U. S. 517. While it was not specifically mentioned in the majority opinion in Brass v. North Dakota, 153 U. S. 391, it was none the less present as will appear from the statement of the case (pp. 397-8) and from the further statement of facts as set forth in Mr. Justice Brewer's dissenting opinion. The duty of regulating such elevator charges under the North Dakota statute was vested by that act in the Railroad Commission and it definitely appeared that the elevators affected thereby were in practical effect a part of the facilities of the railroads serving them.

Stafford v. Wallace, 258 U. S. 735.

German Alliance Insurance Co. v. Lewis

This case is so fully discussed in the opinion in the Theatre Ticket Case that an elaborate analysis here will serve no useful purpose. It is enough to point out the following salient principles there declared:

Insurance Companies "do not sell commodities; they do not sell anything." The case, therefore,

involved a regulation of charges for service and not the price of a commodity. Those charges may be "assimilated to a tax." Such companies are to be treated as self-constituted trustees for the public, organized and maintained for the purpose of distributing among the people at large the losses sustained by particular individuals through fire or similar casualties. The public, therefore, is interested not merely in having the charges of those companies for such service not exorbitant but is equally interested in having those charges not too low. If an insurance company, through an excess of zeal for business, should make its charges unreasonably low, its solvency, in which the public has a vital interest, would be affected.

Those companies hold, as virtual trustees for the people, very large amounts of money; they are "the depositories of the money of the insured, possessing great power thereby and charged with great responsibilty." For that reason, their business is "impressed with a public use." "A large portion of the country's wealth" is protected by insurance. In the funds they hold "all are interested, not in some vague or some sentimental way, but in a very real, practical and definite sense."

The court took special care to point out that its opinion was dealing only with the particular case before it and it has since been observed that the decision there "marks the extreme limit to which this court has thus far gone in sustaining price fixing legislation" (273 U. S. 434). It was also pointed out that, by virtually common consent, in-

surance companies have been regarded since early times as subject to such regulation.

German All. Ins. Co. v. Lewis, 233 U. S. 412.

None of the considerations mentioned apply to the business of selling gasoline.

Wolff Packing Company Cases

There were two of these cases, each involving a statute of Kansas known as the "Industrial Relations Act" which specifically declared that the manufacture and preparation of food for human consumption was a matter affected with a public interest. It created an industrial court with power to fix wages and other conditions of business under which manufacturers of food might continue business in the state.

The first appeal involved that part of the Act regulating the wages of packinghouse employes and that part of the Act was held unconstitutional.

Wolff Pack. Co. v. Court, 262 U. S. 522.

The same statute was under review later with respect to its provision fixing the hours of labor and other regulatory measures designed to avoid interruption of production. The court held that the state court "should have declined to give effect to any part of the order of the state agency."

Wolff Pack. Co. v. Court, 267 U. S. 552.

Throughout both opinions runs the thought, reiterated in subsequent cases, that:

"It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances."

Wolff Pack Co. v. Court, 262 U. S. 537.

It is worthy of note that the commodity involved in these cases was *food.*

The Theatre Ticket Case

This case involved the constitutionality of a New York statute regulating the price at which theatre ticket brokers, who had purchased tickets from theatre owners, might resell the tickets—limiting such price to 50 cents in excess of the price as printed on the face of the ticket by the theatre owner. The act specifically declared that the price for admission to theatres and similar places of amusement "is a matter affected with a public interest and subject to the supervision of the state

for the purpose of safeguarding the public from *fraud, extortion, exorbitant rates and similar abuses.*" The plaintiff, a ticket broker, filed his bill against the District Attorney and others to enjoin the enforcement of the act on the ground that it violated the Fourteenth Amendment. This Court, reversing the judgment of the lower court which denied the injunction, declared the act unconstitutional, holding that the price for admission to theaters or similar places of amusement was not a matter affected with a public interest but was a purely private interest and that the act deprived the plaintiff of the freedom of contract guaranteed by the Fourteenth Amendment. The court further indicated that, while some of the evils in connection with theatre prices set out in the statute exist, they can only be corrected by constitutional means *and that the regulation of prices is not such a means.*

Tyson v. Banton, 273 U. S. 418.

Fairmount Creamery Co. v. Minnesota

The decision in the theatre ticket case was approved and followed in the Fairmount Creamery case. The court there had under consideration a Minnesota act providing that any person engaged in the business of buying milk, cream or butterfat for manufacture or sale who shall discriminate between different localities in the state by purchasing such commodity at a higher price or rate in one locality than is paid for the same commodity by such person in another locality, after making due allowance for difference, if any, in freight rates,

shall be deemed guilty of unfair discrimination and, upon conviction, be fined or imprisoned or both.

The Court reversed a conviction of the defendant, a corporation, under this statute on the ground that the act was unconstitutional as a denial of the freedom of contract guaranteed by the Fourteenth Amendment. The State Supreme Court, in upholding this statute, had said:

> "A centralized creamery, supplied with ample capital and facilities, has the ability and meets the temptation to destroy competition at a buying station by overbidding, absorbing the resultant losses, if any, through the profits of its general business and, when competition is ended, to buy on a non-competitive basis. If it does all this successfully, it has a monopoly and may or may not treat producers justly. The statute seeks to prevent the destruction of competition by forbidding overbidding unless the dealer makes prices at other buying points correspond after proper allowance for the cost of transportation."

This Court, after quoting this excerpt, proceeded to point out that such an argument afforded no justification for the state's interference with the corporation's freedom of contract as guaranteed by the Fourteenth Amendment, quoting from and approving the Tyson case.

It is interesting to note how similar the provisions of the Minnesota act are to those of the act

here under consideration. The latter act provides (Sec. 8, p. 21):

> "It shall be unlawful for any person, firm or corporation engaged in intrastate wholesale or retail sale of gasoline in Tennessee to discriminate against or in favor of any customer or purchaser of said dealer by selling at a different price to said purchasers in different localities in Tennessee, or to different purchasers in the same locality, provided the dealer may take into consideration the difference in freight rates to different localities, and provided further that dealers shall maintain proper differentials between wholesale and retail prices as such differentials may be fixed and determined by the Superintendent."

The principle declared in this decision is that the dairy business, though large and of vital interest to the people, was still a private one and not "affected with a public interest."

Fairmount Creamery Case, 274 U. S. 1.

Ribnik v. McBride

This case involved an act of New Jersey regulating the operation of employment agencies and conferring on the State Commissioner of Labor the power to fix the prices which an employment agent might charge for his services. The court conceded the power of the state to require a license and to regulate the business of an employment agent but declared the question presented to be whether the

Federal Constitution was violated by legislation which attempted to confer upon the Commissioner of Labor power to fix the price to be charged by the employment agent for his services. It was contended that the legislation came within the last of the three categories set forth by this court in the Wolff case, 262 U. S. 535, so that the question presented was "has the business in question been devoted to the public use and an interest in effect granted to the public in that use?" The Court, reaffirming the views announced in the Theatre Ticket case (273 U. S. 418), held that the business of an employment agent was not one affected with a public interest and, therefore, not subject to regulation by the state as to prices.

Ribnik v. McBride, 72 L. Ed. 614.

Allnut v. Inglis, 12 East 527

This case is reviewed in defendants' brief at p. 38. That review fails to notice two controlling considerations. The court was dealing with a party holding "a legal monopoly on landing goods in a public port." He was, therefore, enjoying a special franchise or privilege—the "legal" monopoly in question—and his business was furnishing facilities for the common carriage of goods. The review also fails to take cognizance of the fact that the English Parliament was "omnipotent" (262 U. S. 537) and, therefore, bound by no constitutional limitations.

The court in the Allnut case, as Lord Hale in de Portibus Maris, could not possibly have been

considering constitutional limitations. They were dealing merely with the propriety of the exercise of a conceded power. And there was the same idea in the mind of Mr. Chief Justice Waite when, in the Munn, opinion, he was discussing these authorities.

Other Cases

The case of Van Dyke v. Geary, 244 U. S. 39, is cited by defendants. It is enough to point out that the water plant whose rates were there involved was held by the court to be *"a public utility,"* the court adding:

> "The fact that the service is limited to a part of the Town of Miami does not prevent the water system being a public utility."

The right of the State to regulate the charges of a public utility corporation is not an open question. It could hardly be contended, however, that dealers in gasoline who merely maintain stores at which the public may call and buy are conducting public utilities.

The case of Oklahoma Natural Gas Co. v. Oklahoma, 78 Okla. 5, and 261 U. S. 290 is cited. That litigation involved the rates of *public service corporations.* They had recognized the right of the Oklahoma Corporation Commission to fix rates and had applied for higher rates but were denied an advance, whereupon a bill was filed asking for an injunction unless adequate rates were allowed. Manifestly the case has no pertinency here.

The case of Stafford v. Wallace, 258 U. S. 735, is cited. That case involved the "constitutionality of the Packers and Stockyards Act of 1921 so far as that act provides for the supervision by federal authority of the busines of the commission men and of the live stock dealers in the great stockyards of the country." The bill sought to restrain the enforcement of an order of the Secretary of Agriculture in carrying out the act. The court held, in line with the case of Munn v. Illinois, that the various stockyards of the country, in receiving by rail stock from the ranges and farms of the West and in shipping by rail to consumers in the East, are an interstate commerce agency; that they are therefore "*great national public utilities* to promote the flow of commerce from the ranges and farms of the West to the consumers in the East." The validity of the act was sustained on that ground.

The District of Columbia sought to regulate the rates of a taxicab company on the theory that it was a common carrier. The court held that this was true in respect of the exercise of *its exclusive right* under the lease from the Union Railway Station to solicit deliveries and taxicab business from persons passing to or from trains and similar exclusive rights under similar contracts with the Washington hotels to solicit business from guests but that such part of its business as consisted of furnishing automobiles from its central garage on individual orders generally by telephone could not be regarded as affected with a public interest and

was not subject to regulation by the Commission.
Terminal Taxicab Co. v. Kutz, 241 U. S. 252.

Reliance is placed by defendants on cases supposed to uphold the right of the government to fix lawyers' fees.

Yeiser v. Dysart, 267 U. S. 538.
Capital Trust Co. v. Calhoun, 250 U. S. 208.

In the latter case one Arnold presented a claim against the government which was referred by the Senate to the Court of Claims. That court found in the claimant's favor for $5,051.00 and this finding was certified to congress. There was, of course, no way of collecting the claim except by legislation, and Congress passed an act appropriating the money to pay the claim, but added a proviso that not more than 20% of the amount so appropriated should be used or received on account of services rendered in connection with the claim. In upholding this limitation of 20%, the court pointed out that it was a qualification of a specially created right which Congress had power to impose. There is no suggestion whatever in the opinion that the business of a lawyer is one affected with a public interest and his fees the subject of governmental regulation. The same principle applies to the case of Yeiser v. Dysart, which involved a provision in a Workmen's Compensation Act that no fees should be paid out of any amount received under that act except such as the court should allow.

Reliance is also placed by defendants on the case of Crescent Cotton Oil Co. v. Mississippi, 257 U. S.

129. The case involved a statute of Mississippi prohibiting all corporations, whether organized under the laws of Mississippi or otherwise, from owning and operating a cotton gin when such corporation is interested in the manufacture of cotton seed oil or cotton seed meal. The argument made was that the statute was unconstitutional in that it applied to corporations and not to individuals. There was in no way involved a claim on the part of the state of the right to distinguish between domestic and foreign corporations as to the transaction of business in the state.

Gasoline Business Not One Affected With a Public Interest

Gasoline dealers exercise no public franchise nor any special privilege. They enjoy no right not common to all merchants. Their commodity, in its relation to the public, is in no respect different from other commodities of common use. It is sold to the public by large and small dealers alike. It is no more essential to the every-day life of the people than are many other commodities. In this respect, it can not be differentiated from food, from clothing, from fuel, from shoes, from razors nor from dozens of other articles of common use. The use of all such articles is just as universal and they are just as essential to the life of the average man as is gasoline—often more so. If the gasoline business, by virtue of the universality of the use of gasoline, shall be held to be "affected with a public interest," where shall the line then be drawn? The same principle would apply to dealers in stor-

age batteries, to dealers in tires—indeed *to dealers in automobiles themselves.* Proper oil and lubrication are as essential to automobile operation as is gasoline, and regulation of the prices for oil and for greasing service would be justified. Every person engaged in selling automobiles or their accessories, and their patrons as well, would be "at the mercy of legislative majorities" and freedom of contract would become a mere memory.

The only argument advanced for the view that the gasoline business is one affected with a public interest has been the assertion that gasoline is an article of universal use and is essential to our every-day life. What is the logical consequence of that argument?

> "We may live without friends; we may live without books;
>
> "But civilized man cannot live without cooks."

Shall it be said, in consequence, that the business of cooking is one affected with a public interest? To the feminine mind, cosmetics are much more essential than gasoline, but it could scarcely be said that, therefore, the business of cosmetics is one "impressed with a public use."

Gasoline is important—may be essential—to our business life, but it is used more largely for pleasure than for business. It is useful but it is also the criminal's greatest aid.

This Court has disposed of the defendants' argument based on the universality of use as follows:

"A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect to its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting 'a right,' that synonym more nearly than any other expressed the sense in which it is to be understood."

Tyson v. Banton, 273 U. S. 430.

Cotting v. Godard, 183 U. S. 112.

In language often since approved, the Court has thus indicated the difference between a private and a quasi-public business:

"It is said that this meaning is plainly to be inferred because of fundamental differences both in an economic way and before the law between trade and manufacture on the one hand and railroad transportation on the other. Among these differences are the public character of railroad business, and as a result the peculiar power of control and regulation possessed by the state over railroad companies. The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether

the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction."

U. S. v. Freight Ass'n, 166 U. S. 320.

Legislative Declaration that Gasoline Business Is Affected with a Public Interest Not Effective

This Court has more than once held that such a legislation is not conclusive but that the question is a judicial one. The latest such holding occurs in the Theatre Ticket case following a similar decision in the Wolf Packing Co. case, 262 U. S. 536.

"Nor can we accept the theory than an expressed purpose to prevent possible frauds is enough to justify legislation which really interferes with the free flow of legitimate commerce."

Real Silk Co. v. Portland, 268 U. S. 336.

The characterization, even by the State Supreme Court, of a tax can not bind this court.

Quaker City Co. v. Penn., 72 L. Ed. 607.
St. Louis Co. v. Ark., 260 U. S. 348.

Stress is laid by the defendants in their brief (p. 3) and in their answer (R., p. 51) upon the Governor's message recommending the passage of this Act. While that message charges a monopoly, it does not indicate that plaintiff has been guilty of it. The substance of this message is that the

people of Tennessee are being made to pay too high a price for gasoline. This is quite at variance with Exhibit No. 3 to defendant's answer (pp. 61-76) which is an original bill by a large number of independent gasoline dealers in Tennessee to the effect that gasoline prices in Tennessee are too low, and with the preliminary injunction secured upon the filing of that bill (p. 76) which compelled the major companies to raise their prices.

IV.

Right of State to Fix Price of Ordinary Articles of Commerce Never Recognized

All of the cases in this Court in which the right of the state to regulate charges was sustained—eliminating cases of temporary regulation justified by emergency of war and sustained on that ground alone—have been cases in which the regulation affected *charges for services.* In fact it seems that the state legislatures have rarely attempted to regulate the price of commercial articles. The case usually cited in this connection is that of Yuille v. Mobile, 3 Ala. (N. S.) 140, which is commonly supposed to be a case sustaining an ordinance regulating the price of bread. An examination of that case will show that while the ordinance did regulate the price of bread the only part of the ordinance under consideration by the court was that which regulated *the weight* of bread. The case was this:

> "This was a case agreed. The facts presented on the record are that the defendant in

error is a baker in the City of Mobile; that a quantity of bread made by him for sale was condemned for being of less weight than required by the proclamation of the Mayor."

In the course of the opinion of the Court, after referring to regulations affecting sanitation, interest charges and the like as lawful interferences with personal liberty, said:

> "If, however, such an inquiry were open, it would be very difficult to satisfy this court that the *assize of bread* in a populous city or town is an unwise regulation. The practice has prevailed too long and has been too generally, not to say almost universally, acquiesced in and continued to permit us to doubt that some regulation on this subject is necessary and proper." (Italics original.)
>
> Yuille v. Mobile, 3 Ala. (N. S.) 140.

The same ordinance regulated the price of bread but its validity in that respect was in no respect involved and we have been able to find no holding that, in the absence of an emergency like the existence of war, there is any authority in the state to regulate the price of any ordinary article of commerce.

Even as to the matter of the weight of bread, there are serious limitations upon the power of the legislature. Quite recently this Court has declared unconstitutional a Kansas statute regulating the weight of bread loaves.

Burns Baking Co. v. Bryan, 264 U. S. 504.

The legislature of Montana passed an act creating a State Trade Commission with power to regulate prices and profit, including those of ordinary mercantile businesses. Dealing with this the Court said:

> "Mindful of the familiar principles that control Federal courts in consideration of the constitutionality of state legislation, it is believed the enactment at bar is within the inhibition of the Fourteenth Amendment, and it is so determined. If there be any decision, by a court of last resort, contrary hereto, it has not been cited and is unknown. The Bakers' Bread Cases—Mobile v. Yuille, 3 Ala. 140, 36 Am. Dec. 441; Guillotte v. New Orleans, 12 La. Ann. 432—do not take account of the constitutional provisions here involved. A permanent injunction will issue."
>
> Holder Hdw. Co. v. Boyle, 263 Fed. 137.

V.

Assuming for the Purpose of Argument That Evils Exist in the Gasoline Industry, Those Evils May Not Be Cured Save by Legislation Which Comports with the Constitution

Here again is a proposition which has been declared and elaborated by the Supreme Court in the Theatre Ticket case and reiterated in the Fairmount Creamery case. See infra, p. 39.

Similar declarations have been made in other cases. For example, the Court, referring to the

supposed right of a state to exclude from its borders a foreign corporation for no other reason than that such is its will, has held that a state may not deny to such a corporation the right to enter the state nor the right to remain in the state unless it shall consent to a surrender of some right guaranteed by the Federal Constitution.

> "It has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution or laws of the United States. * * * Acts generally lawful may become unlawful when done to accomplish an unlawful end."
>
> Frost v. Railroad Commission, 271 U. S. 594, 599.

The opinion in that case reviews the authorities exhaustively and makes it clear that *a state may not use a lawful power for an unlawful purpose or exercise an unlawful power for a lawful purpose.*

VI.

Price Regulation an Unconstitutional Remedy

In the very nature of things a price regulating statute such as is here involved can not be a constitutional remedy for the evils alleged to exist in the gasoline industry—evils which we by no means admit. The Act is all embracing and must be so since otherwise it would be unconstitutional as discriminatory.

Cotting v. Godard, 183 U. S. 79.

McFarland v. Sugar Ref. Co., 241 U. S. 79.

And yet the all-embracing character of this legislation must necessarily accomplish its downfall. This can not be better stated than in the language of the Court in the Theatre Ticket case, quoted and approved in the Fairmount Creamery case:

> "It is urged that the statutory provision under review may be upheld as an appropriate method of preventing fraud, extortion, collusive arrangements between the management and those engaged in reselling tickets, and the like. That such evils exist in some degree in connection with the theatrical business and its ally, the ticket broker, is undoubtedly true, as it unfortunately is true in respect of the same or similar evils in other kinds of business. But evils are to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental interference. One vice of the contention is that the statute itself ignores the righteous distinction between guilt and innocence, since it applies wholly irrespective of the existence of fraud, collusion or extortion (if that word can have any legal significance as applied to transactions of the kind here dealt with—Com. v. O'Brien, 12 Cush. 84, 90), and fixes the resale price as well where the evils are absent as where they are present. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely

be entangled in its meshes, some wrong-doers also may be caught."

Tyson v. Banton, 273 U. S. 442.
Fairmount Co. v. Minn., 274 U. S. 10.
U. S. v. Reese, 92 U. S. 221.

It is no answer to this argument to say that this plaintiff, which operates all over the state, may not assert that the act is unconstitutional as to a small merchant. No line can be drawn on one side of which are placed large dealers in gasoline and on the other side small dealers. It would be impossible to draw such a line correctly—impossible to say at what point the regulation should begin and at what point it should end. The proposition that *the state may not regulate the price of some dealers and leave other dealers to fix their own price* needs neither elaboration nor authority. As pointed out in cases already referred to, the Court has more than once stricken down state legislation on the ground that it was partial in its operation.

"If once the door is open to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guarantee of the equal protection of the laws is lost, and the door is open to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made" (Infra, p. 48, 49).

Cotting v. Godard, 183 U. S. 112.

We say, therefore, with confidence, that any dealer affected by the act may urge against it that, of necessity, it embraces all dealers alike and that, being unconstitutional as to a large number of them and, therefore, not binding on them, it is unconstitutional as to all and none are bound by it.

In Schlesinger v. Wisconsin, 270 U. S. 240, the court stated the rule very clearly that *rights granted by the Federal Constitution to one person can not be infringed in order to prevent violation of law by another person.* Therefore, the charges—wholly unwarranted we say—as to the plaintiff here can afford no support to the act under consideration. For if the act is void as to those dealers against whom it is not pretended such charges can be made, it necessarily fails as to all dealers.

In this connection the following language of Mr. Justice Holmes, though occurring in a dissenting opinion, is pertinent and of undoubted soundness.

> "Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law, of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to

find the meaning of some not very difficult words. We must try—I have tried—to do it with the same freedom of natural and spontaneous interpretation that one would be sure of if the same question arose upon an indictment for a similar act which excited no public attention, and was of importance only to a prisoner before the court."

Northern Securities Co. v. U. S., 193 U. S. 400.

Applying this principle to the case at bar—if a small country merchant who maintains a single gasoline pump as an incident to his grocery store were indicted for a violation of this statute, could a conviction lawfully be had? If not, the act is invalid as to every dealer no matter how large *for the mere largeness of an individual's business can not lessen his rights under the Constitution.*

Cotting v. Godard, 183 U. S. 104.

Equal Protection of the Law

This bill affects corporations and individuals alike and we have argued that it must be so or it would violate the guarantee of the equal protection of the law. This is made clear by the recent case of Quaker City Cab Co., in which the court struck down the statute of Pennsylvania imposing a tax on all corporations, foreign or domestic, engaged in public transportation, but not applying to individuals or partnerships. It was held that this was a denial of the equal protection of the law and must be declared unconstitutional, even though the complaining party was a foreign corporation.

Quaker City Cab Co. v. Penn., 72 L. Ed. 607.

VII.

Act Invalid Because Its Purpose and Effect Is Not Merely to Protect Price Paid by the Consuming Public but Margins in Favor of Middlemen

As already indicated, a dominant purpose and effect of this act is to protect the differential, that is to say, the margin between the price the middleman pays and the price at which he sells. The italicized portions (infra, pp. 2-6) make this plain. This margin is sought as between tankcar and tankwagon prices and also between tankwagon and service station prices. It can be accomplished by lowering the price which the middleman pays or by raising the price at which he sells, or through both methods. The price at which the tankcar purchasers buy, being fixed in a foreign state, is beyond the control of Tennessee Commissioner, with the result that this margin or differential must often be protected by raising the price to the consumer.

Argument is not necessary to prove that, whatever may be the power of the legislature to protect the consuming public from exorbitant prices, there can be no power to regulate prices with a view to protecting the middleman at the expense of the consuming public. So much of the act, therefore, as undertakes to protect the differential is void.

Lest it be thought that this argument about the differential is theoretical and not practical, we respectfully direct attention to Exhibit No. 3 to the answer of the defendants here (pp. 61-76) which is

a copy of the original bill filed by twenty-one independent dealers against six major companies in the Chancery Court of Rutherford County, Tennessee, and particularly to the temporary injunction granted upon the filing of that bill (p. 76), which the Chancellor (p. 107) refused to dissolve. That injunction mandatorially compelled the defendant companies to raise their prices for gasoline in Tennessee.

VIII.

That Plaintiff Is a Foreign Corporation Cannot Defeat Its Right to Relief

While it is frequently said that foreign corporations cannot do business in a state except by its consent and may be arbitrarily subjected to such conditions as the state chooses to name, that principle cannot save this statute for the reason that the state cannot exact of a foreign corporation a sacrifice of its constitutional rights as a condition precedent to its *engaging or continuing* in business within the state. It cannot impose an unconstitutional condition. The foreign corporation, after admission into a state, stands on an equal footing and must be classified with domestic corporations of the same kind. While the state, without discrimination, may provide that, for failure of a foreign corporation to comply with any law governing its conduct within the state, its license may be revoked, such law must be valid and constitutional. Therefore, an act imposing a much heavier tax on the property of foreign insurance companies than is imposed on domestic insurance companies of the

same kind, being in violation of the Fourteenth Amendment, cannot be sustained on the ground of the State's right to exclude a foreign corporation from its borders. And the coming into a state of a foreign corporation with knowledge of conditions imposed by the state is not a contractual waiver of its constitutional privileges and does not preclude it from objecting to a state statute which violates the equal protection clause of the Fourteenth Amendment.

Hanover Ins. Co. v. Carr, 272 U. S. 494.
Quaker City Co. v. Penn., 72 L. Ed. 607.

The case of Fidelity Deposit Co. v. Tafoya, 270 U. S. 426, was a bill by a foreign insurance company against the members of the Corporation Commission of New Mexico to enjoin them from excluding plaintiff from the right to do business in the state. In reversing the decree of the lower court which denied an injunction and sustaining the right to an injunction, the Court held that a foreign corporation is entitled to seek the aid of the Federal Court to prevent its exclusion from the state in violation of its constitutional rights, even though the statute relied upon to justify the exclusion does not plainly import to justify and require the threatened exclusion, and its constitutional right is not denied. The opinion refers to the right of the state arbitrarily to exclude a foreign corporation "without other reasons than that such is its will," and adds:

> "But it has been held a great many times that the most absolute seeming rights are qual-

ified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as a part of a scheme to accomplish a forbidden result (citing authorities). Thus the right to exclude a foreign corporation cannot be used to prevent its resorting to a Federal Court (citing authorities), or to tax it upon property that by established principles the state has no power to tax (citing authorities. . ."

Fidelity Co. v. Tafoya, 270 U. S. 426.
Palmetto Ins. Co. v. Conn., 272 U. S. 304.

The state of Ohio undertook to fix as a condition precedent to the right of a foreign corporation to do an intrastate business therein a privilege tax based upon the entire authorized capital stock of the corporation, which in the particular case was very much more than the stock actually issued. The corporation filed its bill to enjoin the collection of so much of the tax as was exorbitant and the state defended on the ground that it had the right to name any condition it pleased upon a foreign corporation desiring to enter its borders. In sustaining the injunction, the court held that a privilege tax on a foreign corporation must bear some reasonable relation to the value of the privilege and that the act imposing the tax in question "violated the equal protection clause of the Fourteenth Amendment."

Air-Way Co. v. Day, 266 U. S. 71.

In Frost v. Railroad Commission, 271 U. S. 583, it was held that a private carrier was unconstitu-

tionally deprived of his property without due process of law by a requirement of the state that he become a public carrier in order to secure a permit to use the public highways for transportation purposes. The opinion elaborates the proposition that while the state may exclude a foreign corporation for no other reason than that it wants to do so, still it cannot exercise this power to accomplish an unconstitutional purpose, for "acts generally lawful may become unlawful when done to accomplish an unlawful end," quoting at length from Security Ins. Co. v. Prewitt, 202 U. S. 246, and other cases, particularly W. U. Tel Co. v. Kansas, 216 U. S. 1. Among other quotations was this from Justice Day's dissent in the Prewitt Case.

> "Conceding the right of a state to exclude foreign corporations, we must not overlook the limits upon that right, now equally well settled in the jurisprudence of this court, that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution. If this were otherwise, the state would be permitted to destroy the right created and protected by the Federal Constitution under the guise of exercising a privilege belonging to the state. . . . While we concede the right of a state to exclude foreign corporations from doing business within its borders for reasons not destructive of Federal rights, we deny that the right can be made to depend upon the surrender of the protection of the Federal Consti-

tution which secured to alien citizens the rights to resort to the courts of the United States." Frost v. Railroad Commission, 271 U. S. 596.

If the right to regulate prices rests alone upon the fact that the plaintiff is a foreign corporation, then there is no right in the State to regulate the prices charged by domestic corporations and the situation would result that dealers who are foreign corporations must sell at prices fixed by the State, while domestic corporations and individuals can sell at any price they please. That such a situation would amount to a denial of the equal protection of the law seems plain.

IX.

Alleged Unlawful Practices No Justification for Denial of Constitutional Rights

The charges made in defendant's answer against the plaintiff here have no place in this discussion. While we by no means admit they are true, we shall move to strike them out as impertinent and, therefore, there is no occasion for going into the truth of them now. The principle that neither the piety nor the depravity of persons affected by an act determine its constitutionality has been thus well expressed by the Tennessee Supreme Court—language afterwards quoted and approved by this Court:

> "Every partial or private law which directly purpose to destroy or affect individual rights, or does the same thing by affording remedies

leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule and the mass of the community who made the law by another."

Vanzant v. Waddel, 2 Yerg. 270.

Cotting v. Godard, 183 U. S. 105.

The same view has been expressed in a case which involved a statute of Louisiana attempting to regulate prices:

"The answer alleges that the plaintiff is a monopoly and combination in restraint of trade in buying, refining, and selling sugar throughout the United States and, completely controls the sugar trade in Louisiana, and sets forth a long series of letters thought to show efforts to obtain and keep such control. It obliquely intimates that the plaintiff can fix prices on occasion even in the New York market, admitted to be the ruling one in the United States. It alleges that suits have been brought against the plaintiff by sugar planters, under the Sherman Act (26 Stat. at L. 209, Chap. 647, Comp. Sta. 1913, Sec. 8820), for a total of near $200,000,000, and that after the exposure of the plaintiff's criminality in a suit by the United States that seemed to have come to nothing, this law was passed. All of the foregoing, the main portion of the answer, is offered as ground for denying to the plaintiff any equitable relief. . . . We deem it enough to say that neither that supposed connection nor the

> general intimations of the plaintiff's wickedness in the answer deprive it of its constitutional rights, or prevent it from asserting them in the only practicable and adequate way."
>
> McFarland v. American Sugar Ref. Co., 241 U. S. 84-85.

It may be observed that the record in the Theatre Ticket case disclosed a practical monopoly on the part of the agents whose prices were sought to be regulated, that the legislature had declared in the statute that such regulation *was necessary* to safeguard "the public against *fraud, extortion, exorbitant rates and similar abuses,*" and that the Court recognized that "such evils exist in some degree." None the less the Court held that the ticket agents were entitled to assert their constitutional rights and to have them protected and that a regulation of their charges was not a constitutional method of correcting the alleged abuses.

In the Fairmount Creamery case, the court pointed out that "there is no profession, probably no business, which does not offer peculiar opportunities for reprehensible practices" but that this could not justify the submersion of the fundamental guarantees of the Constitution. See also

Adams v. Tanner, 244 U. S. 594.

Act Not Supportable on the Theory of Threatened Monopoly and the Protection of Competition

The charges by the defendants of a monopoly on the part of the plaintiff here permeate their

answer and their brief. They ask to have the fact of monopoly taken for granted. Those charges, so far as they relate to the present, are but the expression of a popular fiction and oft reiteration can not make them true. For reasons elsewhere indicated (*infra,* p. 48), we think them wholly irrelevant but, because they are so emphasized, both in the answer and the brief of the defendants, and lest our silence on the subject be taken as a tacit admission of those charges, we ask leave for a brief reference to them.

1. It is charged (pp. 28-30) that by the decree of the Tennessee Supreme Court (120 Tenn. 86, affirmed 217 U. S. 413) the Standard Oil Company of Kentucky was ousted from the state for monopolistic conduct and that the appellee here, the Standard Oil Company of Louisiana, at once took its place. That was in May, 1910. Elsewhere herein (p. 69) we have pointed out that the decree of ouster and the injunction embraced therein can have no effect against the appellee here. It may be added that the wrong-doing on which the ouster decree was based was an isolated instance in the town of Gallatin in which the Kentucky Company, by the gift of a small quantity of oil, induced three persons to cancel orders they had given to the Evansville Oil Company.

2. It is charged (p. 36) that the Supreme Court of Ohio found that the Standard Oil Company of Ohio was a party to an unlawful combination, in consequence of which it was prohibited from doing business in that state. That decree was rendered

in March, 1892—thirty-six years ago—and is of of no possible probative force here.

3. It is charged (pp. 36-37) that this Court, in what is know as the Standard Oil Cases, 221 U. S. 1, adjudged that an unlawful combination existed among the Standard Oil Companies. The decree in that case was rendered May 15, 1911. It was against thirty-seven oil and/or pipe line companies, including the Standard Oil Company of New Jersey, and seven individuals who were in alleged control of the defendant companies and, in language clear, emphatic and all-embracing, enjoined those defendants from continuing in any way the monopoly or control theretofore existing *or any like combination or conspiracy,* the effect of which would be to restrain commerce in petroleum or its products among the states or with foreign nations. That decree is set forth in full in the margin of 173 Fed. Rep. 199. With respect to that decree, the defendants say:

> "Aside from a colorable distribution of the stock held by the Parent Company, the order of the Supreme Court of the United States has never been complied with, and the evils condemned in the opinion of the Court, in that cause, have never been remedied or abandoned."
>
> Record, p. 40.

This is a severe indictment, yet the defendants have the boldness to make it and to offer an argument on the faith of it. The statement means that

the decree of this Court, solemnly rendered, has been mocked and that the officers of the United States charged with administration of the federal law have wholly ignored their duty. Such an assumption will not be indulged. It may well be assumed, however, that the other charges made by the defendants here against the plaintiff are of the same character—unwarranted.

4. The answer refers to a report by a sub-committee of the Senate written by the late Senator LaFollette and adopted by the full committee. That report was made in 1923 and it does not appear that any action has been taken on it by the Senate or by any other arm of the federal government. It does not appear how far the investigation was judicial nor to what extent the Oil Companies denounced by the report were given an opportunity to present their case. The failure of the Senate to take any action on the report justifies the assumption that it did not reflect the views of the Senate.

5. The answer refers (pp. 43-48) to the charges in a bill filed by the United States against a number of oil companies, based on an alleged unlawful use of a patent known as the "cracking process" for the manufacture of gasoline. Those charges are those of an advocate and refer solely to the use of the patent. They have been vigorously denied by the defendants in the case. The litigation is still pending and undetermined.

6. The answer also refers (pp. 50, 61-114) to the suit of Consumers Oil Company et al v. Stand-

ard Oil Company et al, begun in January, 1925, by twenty-three independent oil dealers (p. 61) against the appellee here and six other major companies in the Chancery Court of Rutherford County, Tennessee. As in the previous instances, the charges were those of an advocate. The purpose of that bill was to have a mandatory injunction compelling the defendant companies to restore the differential of three or four cents between tank car and tank wagon prices and a similar differential between tank wagon and service station prices. That suit was voluntarily dismissed by the plaintiffs therein after the taking of much proof and after an admission on the witness stand by one of the complainants, himself a lawyer as well as a gasoline dealer, *that they had failed to show any conspiracy* (p. 116).

> 7. "It is to be noted that neither in its bill as originally filed, nor by any amendment thereto, for which it had full opportunity, did the Standard Oil Company of Louisiana anticipate or attempt to deny the existence of the facts and conditions set forth in the answer."
>
> Brief for Appellee, p. 30.

Believing that the charge of monopoly or of improper practices on the part of particular dealers can have no place in determining the vital question in this case—whether the gasoline business is one affected with a public interest—plaintiff forbore in its bill or by amendment thereof to deal

with such irrelevant matter. However, it does appear from the original bill (p. 11) that:

> "There are a number of companies operating in Tennessee which are large handlers of gasoline and rivals and competitors of plaintiff and of each other in the business of selling gasoline in Tennessee and elsewhere. Outside of Tennessee and constituting a principal source of supply are a large number of refineries with whose conduct and prices plaintiff has nothing to do."

The Act itself, in stating the reasons for its passage, does not charge the existence of a monopoly but merely "an attempt on the part of some dealers to monopolize the business and to destroy competition." And Exhibit No. 3 to defendants' answer (pp. 61-76) indicates the presence in Tennessee a short time before this Act was passed of a large number of gasoline dealers uncontrolled by the plaintiff and in sharp hostility to it.

Assuming, however, for the purposes of argument only, that the alleged "threat of monopoly" exists, it is clear that regulation of prices by the state is not a constitutional remedy. In the Theatre Ticket case, the legislature had specifically declared a regulation of prices to be necessary to prevent "extortion," meaning, of course, extortion through monopoly. It developed in that case that there was a monopoly in the theatre ticket brokers as to choice theatre seats. Referring to the claim

that the act was necessary to prevent fraud and extortion the Court said:

> "That such evils exist in some degree in connection with the theatrical business and its ally, the ticket broker, is undoubtedly true, as it unfortunately is true in respect of the same or similar evils in other kinds of business. But evils are to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental interference."
>
> Tyson v. Banton, 273 U. S. 418.

The grant of a patent carries with it an intrinsically monopolistic right. Monopoly is the very essence of a patent. If, therefore, the existence of a monopoly affects an article with a public interest, it must follow that the State has the right to regulate the price of every patented article.

Aside from all this, the *act here involved does not protect competition but, on the contrary, destroys it.* With prices absolutely fixed, with an express prohibition against the making of any concession whatever, and with no right to change prices except with the Commissioner's consent, to secure which at least five days is necessary (p. 20, Sec. 6), no opportunity is left for the play of competition except as to service.

XI.

The Act in Question Violates Prohibition Against Impairment of Contracts

> "Plaintiff now has in Tennessee many contracts with purchasers of gasoline in Tennessee at varying prices, such price depending upon peculiar circumstances affecting particular cases, including a consideration of the quantity purchased, and the said act operates to annul and make unlawful all of those contracts."
>
> Record, p. 9.

The act in question contains no saving clause to protect valid contracts already entered into in good faith and is, therefore, unconstitutional in so far as it affects those contracts. Article I, Sec. 10, of the Federal Constitution provides that no state shall pass any law impairing the obligation of contracts.

XII.

Denial of Due Process of Law

The concluding sentence of the first paragraph of Sec. 8 of the Act reads:

> "And it shall also be unlawful for any person, firm or corporation to bring about an unreasonable or unfair increase in the refinery prices of gasoline to dealers in Tennessee, or who shall aid or conspire, combine or confederate with others in aiding to bring about

> such unreasonable and unfair increase in such refinery price." No person who violates any of the provisions of this section shall be entitled to "a permit to engage in the wholesale or retail or intrastate sale of gasoline."

The rule is well settled that where an act prescribes a duty and fixes the penalty for violation thereof, it is a denial of due process where the duty prescribed is so vague and indefinite that one may not know definitely what it is.

Connally v. Construction Co., 269 U. S. 385.

Another case involved the validity of Sec. 4 of the Food Control Act, which made it unlawful

> "For any person wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing with any necessity; to conspire, combine, agree, or arrange with any other person * * * ; (e) to exact excessive prices for any necessity."

The court held that this act was invalid as a denial of due process of law because it fixed no ascertainable standard of guilt; that no such power existed in Congress even during a state of war; that whatever might be the effect of a war emergency on the right of freedom of contract (the restriction in such cases being only temporary), there was no suspension, even during war, of the constitutional right of the defendant in a criminal case to due process of law.

U. S. v. Cohen Co., 255 U. S. 88.

XIII.

Statute Unconstitutional Because, Taking Effect at Once, It Prevents the Sale of Gasoline Until the Performance of Conditions Precedent Which Will Require Much Time

It is declared unlawful to sell gasoline without a permit and the Act took effect the moment it was signed by the Governor. The conditions precedent to the issuance of a permit are that the Superintendent of the newly established Bureau of Motors and Motor Fuels shall be appointed. He is required to make elaborate investigations on his own initiative and to prepare and place of record data on the subject. He is also required to study the applications filed by the various applicants for permits. Of necessity, this will require much time. Before he can complete the discharge of these duties the applications for permits must be filed and those applications are required to contain information for the compilation of which much time will be required. There is no power vested in any arm of the State to suspend the operation of the statute during the time necessary to meet these conditions precedent to a permit.

It necessarily follows, therefore, that by the very terms of the Act a period which must be appreciable and may easily extend into several weeks, must elapse, during which the sale of gasoline in intrastate commerce is absolutely prohibited.

A statute of Ohio, known as the Blue Sky Law, forbade, among other things, the sale of securities

for 30 days after the dealer or issuing company had furnished to the Public Commission the required data. In holding this statute invalid on this ground, the court said:

> "During the period of 30 days after the application is made and data filed with the Commission, there can be no sale of the securities. The Commission is powerless to permit; any company which issues and sells or any dealer who sells is guilty of felony. This is the law, without regard to the character of the securities. They may be of the highest quality in every respect; the emergency requiring immediate sale may be extreme; these considerations cut no figure; the law proclaims a 30-day paralysis. If a company, perfectly solvent but in need immediately of ready money, arranges a bond issue and has people ready to purchase the bonds, nothing can be done for 30 days; in the meantime things must stop and the company, perhaps, must lose its credit and fail. Such a provision is an arbitrary and oppressive interference with the right of contract; it bears no 'reasonable relation' to the public health or the public morals, or even to the 'public welfare,' in the broadest conceivable sense of that phrase."
>
> Ala. Transp. Co. v. Doyle, 210 Fed. 181.

XIV.

Entire Act Unconstitutional. No Portion May Be Saved by Eliding Others

> "A law which can not endure the test of the Constitution without judicial amendment must perish."
>
> Howard v. I. C. R. Co., 207 U. S. 515.

A serious argument is made by the defendants that, even though such portions of the Act as undertake to regulate prices are unconstitutional, Sections 1, 2, 3 and 4, presently reviewed, should be allowed to stand. These sections provide: (1) for the creation of a bureau to administer the Act, (2) for the collection and study by the Commissioner of data relating to the cost and proper selling price of gasoline, (3) the issuance of a permit and (4) the furnishing by gasoline dealers of certain information as a condition precedent to a permit. It will be conceded that every other section relates directly and entirely to the fixing of gasoline prices. Even Section 11, which defines the term "gasoline," limits the definition of that word "as used in this Act."

In support of this argument of defendants, the principal reliance is the case of Weller v. New York, 268 U. S. 319, where so much of the New York Theatre Ticket Act as required ticket vendors to apply for a license was upheld after eliding that part of the Act which undertook to regulate resale prices. That case is obviously distinguishable from the instant case. The operative provisions of the

New York Act consisted of Sections 168-174, inclusive. If there is stricken from the Act Sec. 172 (which fixes prices) and from Secs. 169-170 the words "will not exact or receive a price for any such ticket or evidence of the right of entry in excess of the prices authorized by this article," there remains, as the court pointed out, a workable plan. So altered, the Act would still require the procurement of a license for which $100.00 (to be a part of the general revenue of the state) is to be paid annually; the applicant is required to produce satisfactory proof of his moral character and to give bond that he will not be guilty of any fraud or extortion; the Comptroller is given the power, upon complaint of any citizen, to investigate the business and the business practices or methods of any licensee and to revoke the license if they are improper; and the courts are given power to punish violations of the Act.

Weller v. New York, 268 U. S. 319.

No such situation exists here. Stripped of its price fixing provisions, the present Act is emasculated and a statute the legislature never intended to pass is substituted for that actually passed.

Trade Mark Cases, 100 U. S. 82.

The controlling rule in this connection does not admit of debate. Two conditions are requisite: (1) the legal and illegal provisions must be clearly separable and (2) it must be "plain" that the legislature "would have enacted the legislation with the unconstitutional provisions eliminated."

Howard v. I. C. R. Co., 207 U. S. 501.

I. C. R. Co. v. McKendree, 206 U. S. 514.

The first four sections must fall not only because neither of the above conditions is met but because those sections are so much a part and parcel of the statutory scheme of regulation of prices as to be themselves unconstitutional. All this we believe is obvious upon an analysis of these sections.

It is important, at the outset, to note the purposes of the Act. They were three-fold: (1) To fix the prices at which wholesale and retail dealers should sell; (2) to provide (sec. 8) against selling at different prices to different persons in the same locality or at different prices to the same persons in different localities (this is in direct violation of the rule declared in the Fairmount Creamery case, 274 U. S. 1); and (3) to protect the differential, that is, to enact into law the remarkable injunction shown in defendants' Exhibit No. 3 (p. 76). Every provision of the Act was in aid of these purposes. These purposes being unconstitutional, the aids to their accomplishment must fall.

There should be also noted in this connection the provision of the Tennessee Constitution (Art. II, Sec. 17) that "no bill shall become a law which contains more than one subject, that subject to be expressed in the title." By numerous decisions, the Tennessee Supreme Court has indicated the necessity of observing this provision with exactness, and it must be assumed that the legislature had it in mind. The title to the Act here involved does not refer to the subject of collecting information and, therefore, Sections 2 and 4 would fall if they stood alone. The failure to refer to them in the

title indicates clearly that the legislature regarded them merely as aids to an announced purpose.

Reviewing the sections in question:

Section 1 creates a division of the Department of Finance & Taxation to be known as the "Division of Motors and Motor Fuels," same to be in charge of a superintendent. The only purpose of this section is to provide a department or bureau *for carrying out the price-fixing purpose of the Act.* No duties are assigned to the new division except in connection with price fixing.

Section 2 makes it the duty of the Commissioner to make investigation and to collect and record data concerning the manufacture and sale of gasoline; the cost incident to the refining processes at the refineries to dealers in Tennessee and elsewhere; freight rates; differentials in prices to the wholesale dealer and the retail dealer; the cost and expense incident to the sale of gasoline; and the like. The concluding part of Section 2 is this (p. 17):

> "It shall be the duty of the Superintendent of the Division of Motors and Motor Fuels to issue permits to dealers, subject to the approval of the Commissioner of Finance and Taxation, authorizing the sale by wholesale or retail of gasoline in this State *at prices fixed and determined as hereinafter provided,* and to perform such other duties as may be prescribed by subsequent section of this Act."

The only "other duties" prescribed in the Act are the hearing of applications for change in prices

either by the applicant, the Attorney General, or some rival dealer, and the enforcement of the price fixing provisions.

It must be manifest, therefore, that Section 2 has no relation to any subject except that of price fixing and that the legislature would never have enacted it except as an aid to the price fixing purpose.

Section 3 makes it unlawful for any person to engage in the sale of gasoline in intrastate commerce in Tennessee without having first obtained a permit and no permit shall be issued "unless and until such dealer shall make application therefor in accordance with the regulations of this Act and *in compliance with all the requirements and provisions hereof.*"

Bearing in mind that the application for the permit must state the prices to be charged by the applicant, that those prices must be approved by the Commissioner and, if not approved by him must be so changed as he may direct, and that the permit itself *is limited to sales at the prices so approved,* it is obvious that Section 3 has no purpose or effect except the carrying out of the price regulating scheme. *The permit is merely a bureau order fixing prices.* And it may here be pointed out that the general Revenue Act of Tennessee now provides and has provided for years that no person may engage in the gasoline business without first securing a license and paying the prescribed priv-

ilege tax and such license the plaintiff already holds (p. 5).

Acts of Tenn. (1927), Ch. 89, pp. 320-21.

Section 4 provides that every person desiring to engage in the sale of gasoline in intrastate commerce in Tennessee must make application to the superintendent, setting out five specific items of information (*infra*, pp. 3-4), among which are (c) the price or prices at which the dealer at the time of the application is selling gasoline, (d) the cost price of such gasoline to the dealer including refinery cost, transportation, taxes, cost of distribution, etc., and (e) the price or prices at which he proposes to sell gasoline either as a wholesaler or as a retailer. Argument is not necessary that this section, like the others, is but a part of the scheme for price regulation by the State. The admitted purpose of this information is solely to enable the superintendent to determine what price he will fix.

Assuming that the price fixing sections of the statute fail, of what value is Section 4? The information called for by that section may become valueless immediately. For, within a week afterward, the dealer may change the character of his business from wholesaler to retailer or vice versa; he may change his place of location; he may sell his business to someone else. His cost price and operating expense fluctuate widely and often. Being under no regulation as to prices, he may change his prices given to the Commissioner the day after he gives them.

It thus appears that the first four sections of the Act—the sections which applicants are seeking to maintain even though the rest of the Act falls—are clearly a part and parcel of the scheme of price regulation and therefore not separable from the remainder of the Act and that the legislature would never have enacted them if it had been advised that the remaining sections of the Act were unconstitutional. Being a mere aid to unconstitutional requirements, they fall under the same condemnation.

Section 12 provides that if any section or provision of the Act shall be held invalid, the validity of the other sections shall not be affected. This cannot possibly prevent the court from determining for itself whether the provisions in question are separable and whether the legislature would have enacted any part of a section or sections if it had known that the manifest and declared purpose of the Act and all the provisions to that end were unconstitutional.

An effort is also made by the defendants to sustain Section 10 which provides that before any person may obtain a permit he shall pay a "special permit tax" of $10.00 for each wholesale place and $1.00 for each service station or curb pump—this to be in addition to all other license, inspection or ad valorem taxes and to be "*kept as a special maintenance fund* to aid in defraying the expenses" of the bureau created by the Act. It can not be used for any other purpose.

With all of the price fixing features of the Act eliminated, what expense will there be? What is there left for the newly created bureau to do?

It appears from the record (pp. 52-53) that the sales of gasoline in Tennessee in 1926 were 129,358,213 gallons—an increase over 1925 consumption of 19,000,000 gallons; that there are in use in Tennessee more than 280,000 motor vehicles, exclusive of farm tractors, stationary engines and the like. The record does not indicate the number of wholesale or retail places of business but we take it the Court will know judicially that gasoline filling stations are everywhere and that their number is legion.

The cost and expense which the legislature intended to provide for in the administration of this Act involved, therefore, the fixing of prices for innumerable places of sale and innumerable persons engaged in the sale of gasoline; the hearing and determination of many applications for change of prices; the enforcement of those prices and of other provisions of the Act. The mere clerical work involved in such an administration would be highly expensive and the other details of administration, including the services of the Attorney General, would make the cost of administration much more.

With the price fixing features of the Act annulled as unconstitutional, necessarily the expenses of the new bureau would be negligible.

From all this it seems clear that Section 10 providing for this permit tax can not be saved. It is such a part and parcel of the price fixing scheme as to be inseparable from the rest of it and it is clear that the legislature would never have enacted this section and imposed this tax but for the price fixing features of the Act.

XV.

Ouster of Plaintiff's Predecessor

The brief for appellees (p. 19) as well as the answer of defendants makes the contention that the Standard Oil Company of Kentucky was ousted from Tennessee for a violation of the state anti-trust Act; that thereafter the plaintiff, the Standard Oil Company of Louisiana, entered the state and took its place; that both corporations were under the same domination and control.

It is a matter of record that the decree of ouster was affirmed by this Court in May, 1910 (217 U. S. 413). The ousted company was a corporation of Kentucky and the plaintiff is a corporation of Louisiana, organized some years prior to 1910. The plaintiff entered the State of Tennessee in May, 1910 (pp. 4-5), and has remained there since without objection from any source, although its entry and continued presence were, of course, widely known. It now has an investment of $4,000,000 or more in the state (p. 4) and its annual sales of gasoline are around 50,000,000 gallons (p. 14). During that interval of eighteen years the State of Tennessee had three very able and effi-

cient Attorneys General, one of whom had conducted the ouster case. It is a violent assumption, indeed, that those officials allowed the decree in the ouster case to be ignored. Their inaction can only be construed as indicating a conviction on their part as to the effect of the decree.

The ownership of the stock of the two companies is not disclosed by the record beyond a mere general charge that they were under the same domination but the fact remains unchallenged that the two corporations are separate and distinct and organized under the laws of different states. That a corporation is a distinct entity from its stockholders is a principle long and well recognized.

Parker v. Hotel Co., 96 Tenn. 278.
Green v. Victor Co., 24 Fed. (2d) 380.
Donnell v. Herring Co., 208 U. S. 273.

XVI.

Injunction the Proper Remedy

On this question it may be sufficient to quote the opinion of the court *a quo*.

> "Preliminarily to the constitutional questions argued it is contended for the state that complainants are not in position to invoke relief from a court of equity because no property rights belonging to them have been affected by the Act or can be affected by it until a price has been fixed at which they must sell gasoline. It suffices, we think, to say in re-

sponse to this that the Act makes it unlawful to sell gasoline without having obtained a permit so to do from the superintendent of the Division of Motors and Motor Fuels, that it became effective from and after its passage, and that every sale of gasoline thereafter, made by a dealer, is under the terms of the Act unlawful and is punishable under Section 6437, Shannon's Code, as a misdemeanor. It is alleged in the bills as amended that the defendants are preparing to and will prosecute complainants for each violation of the Act, and indeed it is the duty of the Attorney General and his assistants, as well as the other prosecuting officers of the state, to prosecute any infractions of the law. Clearly, therefore, a continuation of the business of complainants would result in oppressive prosecutions which a court of equity may enjoin if the Act shall be determined invalid. Terrance v. Thompson, 263 U. S. 197, and authorities there cited."

Record, pp. 124-5.

The Act makes it unlawful to sell gasoline without a permit. By specific statute in Tennessee "when the performance of any act is prohibited by statute and no penalty for the violation of such statute is imposed, the doing of such an act is a misdemeanor."

Shannon's Tenn. Code. Sec. (4596) 6437.

The Supreme Court of Tennessee has definitely determined that such a misdemeanor is punishable

as at common law, that is to say by fine or imprisonment or both, saying:

"The rule at common law is thus stated by Mr. Bishop:

'The ordinary common law punishment for misdemeanors is fine and imprisonment, or either, at the discretion of the court. It is imposed whenever the law has not provided some other specific penalty. For example, when a statute forbids or commands an act of a public nature, but is silent as to the punishment, the common law provides fine and imprisonment.' Bishop's New Criminal Law, Vol. 1, Sec. 940.

"The foregoing rule is recognized in several of our own cases (citing many cases); the fine being assessed by the court if $50 or under, and by the jury if over $50 (Shannon's Code, Sec. 7212); and the imprisonment to be fixed by the court (Shannon's Code, Sec. 7202). The Code further provides that when the performance of any act is prohibited by statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor. Shannon's Code, Sec. 6437."

Pressly v. State. 114 Tenn. 539.

"It may, therefore, be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from

resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights."

Ex parte Young, 209 U. S. 147.

Reading this announcement in the light of the law in Tennessee as quoted above, the right of the plaintiff here to file this injunction bill becomes manifest. Owning, as appears from the bill, 100 service stations, mostly in populous cities, and 135 bulk stations from which its tank wagons go out, its sales necessarily amount to thousands daily. If the plaintiff has not the right to file this injunction bill, then its only remedy for testing the constitutionality of this act is to submit to prosecutions for thousands of misdemeanors and take the risk incident to that course. As declared in ex parte Young, this is no remedy at all.

The principle announced in ex parte Young has often been since applied and an injunction granted to restrain state officers from enforcing unconstitutional state legislation.

Harrison v. Railroad, 232 U. S. 318.

Tyson v. Banton, 273 U. S. 418.

In two cases cited by the defendants the soundness of our contention as to the remedy here is sustained.

Okla. Operating Co. v. Love, 252 U. S. 331.

Okla. Gin Co. v. State, 252 U. S. 339.

In those causes, the court sustained the right to an injunction against an order of the State Commission fixing rates on the ground that "it appears that the only judicial review of an order fixing rates possible under the laws of the State was that arising in proceedings to punish for contempt. . . . But the penalties which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and most confident." The court added:

> "If, upon final hearing, the maximum rates fixed should be found not to be confiscatory, a permanent injunction should, nevertheless, issue to restrain enforcement of penalties accrued pendente lite, provided that it also be found that the plaintiff had reasonable ground to contest them as being confiscatory."
>
> Okla. Operating Co. v. Love, 252 U. S. 338.

These cases have no relation to the principal question here involved—whether the gasoline business is one affected with a public interest. They are cited only as to the remedy by injunction which we here claim. They make it clear that where, as in the case at bar, it will be hazardous to test the constitutionality of the act by submitting to an indictment, the plaintiff is entitled to proceed by bill in equity for injunction. As indicated by the quotation last made, if the plaintiff here should submit to an indictment and fail in its defense, it would then become liable to indictment and punishment for thousands of offenses committed while the question was being tested, whereas, under the pro-

ceeding here followed, there will be no such liability if the court shall find that the contest, even though unsuccessful, was in good faith.

On the whole case, we respectfully say, the plaintiff is entitled to the preliminary injunction.

Respectfully submitted,

JOHN W. DAVIS,
H. D. MINOR,
For Appellee (Plaintiff).

[redacted]

[redacted]

[redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 764.

ALBERT S. WILLIAMS, Commissioner of Finance of the State of Tennessee, L. D. SMITH, Attorney General of the State of Tennessee, and R. M. ATKINSON, District Attorney General,
Appellants,

vs.

THE TEXAS COMPANY,
Appellee.

On Appeal from the District Court of the United States for the Middle District of Tennessee.

REPLY BRIEF FOR THE TEXAS COMPANY.

HARRY T. KLEIN,
C. B. AMES,
JOHN B. KEEBLE,
Attorneys for The Texas Company.

SUBJECT INDEX.

PAGE

The Act under Consideration 1

Brief 5

Argument 10

I. Right to Contract a Property Right. Act offends against Fourteenth Amendment to Constitution of United States 10

II. State cannot exercise the power of price fixing, unless business so affected is one that could be subjected to that power regardless of monopolies or contracts in restraint of trade 21

III. A State cannot, as a condition of admission of foreign corporations, require surrender of rights secured by Federal Constitution 26

IV. That part of the Act void that undertakes to prohibit discrimination as to prices of gasoline.... 33

V. Act void because it gives legislative power to Courts 36

VI. An Act void in part is wholly void 41

TABLE OF CASES CITED.

Adair v. United States, 208 U. S., 161.....5, 6, 11

Adams v. Tanner, 244 U. S., 590 ..... 7, 24

Alleyer v. Louisiana, 165 U. S., 578..... 5

Atkins v. Children's Hospital, 261 U. S., 535 ..... 5, 11

Barber v. Connelly, 113 U. S., 27..... 6

Brass v. Stoeser, 153 U. S., 391 .....7, 11, 22

Butcher Union Co. v. Crescent City Co., 111 U. S., 746 5

Brazee v. Michigan, 241 U. S., 340 11

Chicago M. & St. P. R. R. Co. v. Minnesota, 134 U. S., 418 ..... 8, 38

Connelly v. Union Sewer Pipe Co., 184 U. S., 540.... 6

In re: Cumberland Power Co., 147 Tenn., 504..... 8, 40

Cummings v. Trewhitt, 113 Tenn., 561 ..... 9, 42

PAGE

Dayton, etc., Co. v. Barton, 103 Tenn., 604 (Affirmed by this Court, 183 U. S., 13) 5
Employers' Liability Cases, 207 U. S., 463 ..... 9, 42
Fairmont Creamery Co. v. Minnesota, 274 U. S., 1 .....7, 8, 16, 24, 33
Frost Trucking Co. v. R. R. Commission, 271 U. S., 583 .....6, 9, 27
Gillespie v. People, 188 Ill., 176, 52 L. R. A., 283; 80 Am. St. Rep., 176 ..... 5, 6
Gulf, etc., Ry. v. Ellis, 165 U. S., 45 6
Hanover Ins. Co. v. Harding, 272 U. S., 494 ..... 9, 29
Harbison v. Knoxville Iron Co., 103 Tenn., 421 (Affirmed by this Court, 183 U. S., 13) 5
Kennard v. Louisiana, 2 Otto, 480 18
Lochner v. New York, 198 U. S., 45 .....5, 6, 11
Malone v. Williams, 118 Tenn., 390 9
Powell v. Pennsylvania, 127 U. S., 678 6
Power Co. v. Saunders, 274 U. S., 490 ..... 9, 30
Prentis v. Atlantic Coast Line, 211 U. S., 210 ..... 8, 39
Ribnik v. McBride, L. Co-op. Advance Sheet, June 15, 1928, page 614 .....6, 7, 8, 11, 17
State v. Julow, 129 Mo., 163; 50 Am. St. Rep., 443 .. 5
State v. Railroad, 124 Tenn., 1 6
Stratton v. Morris, 89 Tenn., 497 6
Terral v. Burke Construction Co., 257 U. S., 529.... 9
Trade Mark Cases, 100 U. S., 82 9
Tyson & Bro. v. Banton, 273 U. S., 418....6, 7, 8, 12, 23, 42
Vanzant v. Waddel, 2 Yerger, 259..... 6
Western Union Telegraph Co. v. Myatt, 98 Fed., 335. 8
Wolff Packing Co v. Court of Industrial Relations, 262 U. S., 522 .....6, 7, 8, 12
Constitution of Tennessee, Secs. 1 and 2..... 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 764.

ALBERT S. WILLIAMS, Commissioner of Finance of the State of Tennessee, L. D. SMITH, Attorney General of the State of Tennessee, and R. M. ATKINSON, District Attorney General,
Appellants,

vs.

THE TEXAS COMPANY,
Appellee.

On Appeal from the District Court of the United States for the Middle District of Tennessee.

REPLY BRIEF FOR THE TEXAS COMPANY.

The Act Under Consideration.

The Act of the legislature of the State of Tennessee which is now under consideration, is a rather long Act. It is not necessary to go to any great length in stating the features of it which precipitated the filing of this suit.

The purpose of the Act is fairly well stated in the caption, "to regulate the fixing and charging of prices of gasoline."

It is not particularly important to go into detail as to the method by which the price at which gasoline is to be sold is to be determined. It is sufficient to say that in Section 2, certain data and information in regard to the manufacture and sale of gasoline, and the cost incident to refining, freight rates, etc., shall be gathered.

The Division of Motors and Motor Fuels shall definitely fix the price at which gasoline shall be sold, wholesale and retail in the State of Tennessee, and shall also fix a proper differential between the wholesale and retail prices, and a permit shall be issued to sell, only on condition that the applicant will conform to these prices.

If the applicant is dissatisfied with the prices fixed by the Division of Finance and Taxation, the applicant may apply to the Commissioner of Finance and Taxation, in writing, setting forth the objections to the prices fixed by the division just mentioned, and is entitled to a hearing before the Commissioner, notice to be given to the representatives of the State. After the hearing, the Commissioner shall decide upon the question as to whether the prices originally fixed are proper, or not, and if not, shall fix the prices.

The Applicant may appeal from the finding of the Commission to the Chancery Court or the Circuit Court of Davidson County, Tennessee, where the action of the Commissioner will be reviewed upon the transcript of the evidence filed in the proceeding, and the Court to which the application is made may, in its discretion, either supersede or modify said order, in such manner and upon such conditions and terms as may appear to be proper.

The Act further makes it unlawful for any person or corporation engaged in selling gasoline, either wholesale or retail, to make any changes in the prices fixed without application to the Commissioner.

Under Section 8, it is provided that it shall be unlawful to grant any rebate to any purchaser, or to sell to any purchaser at a different price from that fixed as provided in

the statute. And further, that any person, firm, or corporation who violates any of the provisions of the Act, shall not be granted any permit to engage in the wholesale or retail sale of gasoline.

Section 8 of the Act contains this provision:

> "And it shall be unlawful for any person, firm or corporation engaged in intrastate wholesale or retail sale of gasoline in Tennessee, to discriminate against or in favor of any customer or purchaser of said dealer by selling at a different price to said purchasers in different localities in Tennessee, or to different purchasers in the same locality, provided the dealer may take into consideration the difference in freight rates to different localities."

The Act in question was attacked as being beyond the power of the legislature, upon three grounds:

It is beyond the power of the legislature of the State to pass a law under which it may, through its agencies fix the price at which gasoline may be sold in the State, either retail or wholesale, even though the transactions intended to be affected are purely intrastate.

Such a law violates the provisions of the Fourteenth Amendment to the Constitution of the United States, and particularly for the following reasons:

It deprives the producers and vendors of gasoline of their property without due process of law, and denies them the equal protection of the law. It violates Section 8 of Article 1 of the Constitution of the State of Tennessee, in that it takes the property of the producers and vendors of gasoline, said section providing that no man shall be "deprived of his life, liberty or property but by the judgment of his peers or the law of the land."

On an application for an injunction before three judges of the United States Court, Circuit Judge Moorman and

District Judge Gore and District Judge Hicks, a writ of injunction was issued, upon the ground that the Act of the legislature was unconstitutional because it deprived the plaintiff of its rights under the Fourteenth Amendment to the Constitution of the United States, and a decree was entered accordingly. From this decree, the defendants appealed to this court.

BRIEF.

Sections 1 and 2 of Article 2 of the Constitution of the State of Tennessee, provide as follows:

> "SECTION 1. The powers of the government shall be divided into three distinct departments, the legislative, executive, and judicial.
>
> "SECTION 2. No person or persons belonging to one of these departments shall exercise any powers properly belonging to either of the others, except in cases herein directed or permitted."

It is a well settled principle of law that every citizen has a free right to contract in regard to his services, or in regard to the sale and disposition of his property, upon such terms as he may see proper, provided that the business in which he is engaged is not one that has been recognized as exceptional.

It is further well established that this right to contract is "property" within the meaning of the constitutional provisions protecting the right of property, and may not be violated by legislative interference either by the States or by the Federal Government.

This property right is protected, as far as the State legislation is concerned, by the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, and by the land clause in Section 8, Article 1, of the Constitution of the State of Tennessee.

Alleyer v. *Louisiana*, 165 U. S., 578.
Butcher Union Co. v. *Crescent City Co.*, 111 U. S., 746.
Powell v. *Pennsylvania*, 127 U. S., 678.
Lochner v. *New York*, 198 U. S., 45.
Adair v. *United States*, 208 U. S., 161.
Atkins v. *Children's Hospital*, 261 U. S., 535.

Harbison v. *Knoxville Iron Co.*, 103 Tenn., 421.
(Affirmed by this Court, 183 U. S., 13.)
Dayton, etc., Co. v. *Barton*, 103 Tenn., 604.
(Affirmed by this Court, 183 U. S., 23.)
Gillespie v. *People*, 188 Ill., 176, 52 L. R. A., 283, 80 Am. St. Rep., 176.

State v. *Julow*, 129 Mo., 163; 50 Am. St. Rep., 443.

Under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and under Section 8 of Article 1 of the Constitution of the State of Tennessee, the legislature of the State is prohibited from passing any law that arbitrarily discriminates against the owners of one class of property in the use and disposition of it, or from passing any law that places burdens upon one class of property owners, either in the management or disposition of it, that are not placed upon the owners of all other classes of property, unless there is a sound and just reason for the discrimination, and this is always a matter for the Court to determine.

Barber v. *Connelly*, 113 U. S. 27.
Connelly v. *Union Sewer Pipe Co.*, 184 U. S. 540.
Gulf, etc., Ry. v. *Ellis*, 165 U. S., 150.
Lochner v. *New York*, 198 U. S., 45.
Adair v. *United States*, 208 U. S., 161.
Stratton v. *Morris*, 89 Tenn., 497.
State v. *Railroad*, 124 Tenn., 1.
Vanzant v. *Waddel*, 2 Yerger, 270.

The mere declaration in an Act that a business is affected with a public interest, does not prevent the Court from inquiring into that question, and really adds nothing to the force and effect of the Act.

Tyson & Bro. v. *Banton*, 273 U. S., 418.
Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S., 522.
Frost v. *Railroad Commission of California*, 271 U. S., 583.
Ribnik v. *McBride*, L. Co-op Adv. Sheets, U. S. Reports, June 15, 1928, p. 614.

There is no power in the legislature of the State to regulate the prices of commodities such as gasoline, or other commodities in trade or commerce in the State that justifies the exercise of the power undertaken to be exercised in the Act under consideration.

Wolff v. *Court of Industrial Relations*, 262 U. S., 522.
Tyson & Bro. v. *Banton*, 273 U. S., 418.
Fairmont Creamery Co. v. *Minnesota*, 274 U. S., 1.
Ribnik v. *McBride*, L. Co-Op. Adv. Sheets, June 15, 1928, p. 614.

The power of the State to fix the price of commodities, or to regulate the charge for services, must be determined by the character of business carried on. The mere fact that there may be unlawful agreements between certain parties conducting this business, violative of the anti-trust laws of the United States or of the State undertaking to exercise the power of price fixing, cannot affect the question.

Brass v. *Stoeser*, 153 U. S., 391.
Adams v. *Tanner*, 244 U. S., 590.
Tyson & Bro. v. *Banton*, 273 U. S., 418.
Fairmont Creamery Co. v. *Minnesota*, 274 U. S., 591.
Ribnik v. *McBride*, L. Co-Op. Advance Sheets, June 15, 1928, page 614.

Laying to one side business such as inn keepers, hackney coaches, and the like, regulated by the Parliament of England under the old common law, and laying to one side Public Utilities as generally understood in this country, operating under grants or franchises from the State or Federal Government, no power exists to regulate the prices charged in private business, save and except where the charge is made for a service, or use of property that has been dedicated to a public use by the owner, as in the case of grain elevators.

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S., 522.
Tyson & Bro. v. *Banton*, 273 U. S., 418.
Fairmont Creamery Co. v. *Minnesota*, 274 U. S., 1.

Ribnik v. *McBride*, L. Co-Op. Advance Sheets, June 15, 1928, page 614.

The Supreme Court of the United States in its recent cases, has interpreted and limited the grain elevator cases, and the case affirming the power of the State to fix the price of fire insurance, to the facts of these particular cases, and has declared that other business falling within the domain of private business, are not subject to such regulatory determination.

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S., 522.
Tyson & Bro. v. *Banton*, 273 U. S., 418.
Fairmont Creamery Co. v. *Minnesota*, 274 U. S., 1.
Ribnik v. *McBride*, L. Co-Op. Advance Sheets, June 15, 1928, p. 614.

For such abuses as monopolies and conspiracies in restraint of trade, the people are relegated under the later cases, to legislative acts prohibiting monopolies and agreements in restraint of trade, and the punishment for the violation of these acts.

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S., 522.
Tyson & Bro. v. *Banton*, 273 U. S., 418.
Fairmont Creamery Co. v. *Minnesota*, 274 U. S., 1.
Ribnik v. *McBride*, L. Co-Op. Advance Sheets, June 15, 1928, p. 614.

The fixing of rates is a legislative matter and not a judicial matter, and the legislature of the State of Tennessee has no power to pass an Act conferring this power, either primarily or ultimately, upon the judicial branch of the government.

Western Union Telegraph Co. v. *Myatt*, 98 Fed., 335.
Chicago M. & St. P. R. R. Co. v. *Minnesota*, 134 U. S., 418.
Prentis v. *Atlantic Coast Line*, 211 U. S., 210.
In re: Cumberland Power Co., 147 Tenn., 504.

The State cannot exact from a corporation as a condition for receiving the privilege of doing business in the State, the submission to a statute that violates any right granted to the corporation by the Constitution of the United States.

Terral v. *Burke Construction Co.*, 257 U. S., 529.
Frost Trucking Co. v. *Railroad Commission*, 271 U. S., 583.
Hanover Ins. Co. v. *Harding*, 272 U. S., 494.
Power Co. v. *Saunders*, 274 U. S., 490.

Where a part of the Act offends against constitutional limitations, a Court will decline to enforce any part of the Act, unless it can clearly see that the legislature would have passed the Act without the unconstitutional provisions, or with those provisions omitted.

Trade Mark Cases, 100 U. S., 82.
Employers' Liability Cases, 207 U. S., 463.
Malone v. *Williams*, 118 Tenn., 390.
Cummings v. *Trewhitt*, 113 Tenn., 561.

ARGUMENT.

There are three reasons advanced by the appellants for the reversal of this case. They are these:

1. The business of selling gasoline is a business so affected with a public trust as to authorize the State to fix the price at which the gasoline is sold.

2. Even if, in the absence of the existence of a monopoly, there is no right in the State to fix prices at which gasoline is sold, yet where a monopoly exists, as is insisted in this case, the State has the power to fix prices.

3. As the plaintiff in this case is a foreign corporation, and cannot engage in intrastate business in Tennessee except by the permission of the State, it was the State's prerogative to prescribe as a condition of doing business in the State, submission to the terms of the Act authorizing the fixing of prices.

All three of these propositions are untenable. They will be discussed in their order.

I.

The right to contract is a property right, which, except in very exceptional cases, the legislature has no power to interfere with. To abridge this right is, except in the exceptional cases, a taking of property without due process of law, and therefore offends against the Fourteenth Amendment of the Constitution of the United States, and Section 8 Article 1, of the Constitution of the State of Tennessee.

It seems unnecessary to refer to cases supporting this elemental proposition. However, it may not be amiss to refer to *Allgeyer* v. *Louisiana*, 165 U. S., 578, where the principle was held to apply to the right of a citizen to make

a contract of insurance; to *Adair* v. *United States*, 208 U. S., 161, where the principle was applied to the right of a railroad to choose with whom it would make a contract of employment; to *Lochner* v. *New York*, 198 U. S., 45, where the principle was applied to the right of persons working in a bakery to contract for longer hours of service than the State statute permitted, and to the comparatively recent case of *Atkins* v. *Children's Hospital*, 261 U. S., 535, where the principle was applied with reference to an Act of Congress fixing the minimum wages for women. This Act was held unconstitutional under the Fifth Amendment of the Constitution of the United States.

It may also be observed that many businesses may be subjected, under the police power, to regulation and control as to the method and manner of operation, and yet not be subjected to legislative fixing of prices at which commodities handled in the business shall be sold.

This distinction is recognized and established by the decision of this Court in the case of *Ribnik* v. *McBride*, decided by this Court, May 28, 1928, where this Court said, after referring to and distinguishing between the case at bar and the case of *Brazee* v. *Michigan*, 241 U. S., 340:

> "And we since have held definitely that the power to require a license fee and to regulate the conduct of a business, is distinct from the power to fix prices. 'The latter power is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which business shall be carried on.'"

The cases in which the power of the legislature to fix prices exists are few, and cover a period of more than fifty years. The leading case is the case of *Munn* v. *Illinois*, 94 U. S., closely followed by the case of *Budd* v. *New York*, 143 U. S., *Brass* v. *North Dakota*, 153 U. S., and *German Industrial Insurance Company* v. *Lewis*, 233 U. S. The

later cases have restricted these cases, and this Court has refused to follow many of the general statements found in the earlier opinions. The later cases definitely determine that, except in emergencies, such as war, the legislature has no power to fix the price of commodities or services, where no *use* of the property is involved.

In the case of *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S., 522, in passing upon the power of the legislature to establish a system of wages, the Court said:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner, was clothed with such a public interest that the price of his produce or his wages could be fixed by State regulation. It is true that in the days of the early common law, an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a Colonial legislature sought to exercise the same power; but nowadays, one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.
>
> "An ordinary producer, manufacturer, or shop keeper, may sell or not sell as he likes. *United States* v. *Trans-Missouri Freight Association*, 166 U. S., 290, 320; *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S., 252, 256, and while this feature does not necessarily exclude business from the class clothed with a public interest, *German-Alliance Insurance Co.* v. *Lewis*, 233 U. S., 389, it usually distinguishes private from quasi-public occupations."

A clean-cut line of cleavage is drawn between the price one demands for service where property is devoted to a public use, and the price for commodities which are sold upon the public market.

The recent case of *Tyson & Bro.* v. *Banton*, 273 U. S., 418,

has attracted widespread attention. It has opened up again the question as to when the legislature could control or regulate the prices of commodities. This Court laid down the following fundamental principles:

1. The right of the owner to fix the price at which his property shall be sold or used is an inherent attribute of the property itself, and as such, is within the protection of the due process of law clause of the Fifth and Fourteenth Amendments.

2. The authority to regulate the conduct of a business, or acquire a license, comes from a branch of the police power, and it may be quite distinct from the power to fix prices.

3. The power to fix prices ordinarily does not exist in respect to merely private property.

4. A business is not affected with a public interest merely because it is large, or because the public is warranted in having a feeling of concern in respect to its maintenance.

5. A business is not affected with a public interest from the mere fact that the public derives beneficial accommodation or ease from the existence or operation of the business.

6. While the word "interest" in a business is not always so limited as strictly denoting "a right," that synonym more nearly than any other expresses the sense in which it is to be understood.

7. The mere declaration by the legislature that a particular kind of property or business is affected with a public interest is not conclusive upon the question of the validity of the regulation. The matter is always one open to judicial inquiry.

Referring to the Munn case, this Court said:

> "There is some general language in the opinion which, superficially, might seem broad enough to cover

cases like the present one. It was said, for example (p. 126), 'property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large.' Literally, that would include all the large industries, and some small ones; but in accordance with the well-settled rules, the words must be limited to the case under consideration."

It is then said:

"Indeed the language quoted is qualified immediately by the statement of the general rule that, 'when, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created.'

"The significant requirement is that the property shall be devoted to a use in which the public has an interest, which simply means, as in terms it is expressed at page 130, that it shall be devoted to 'a public use.' Stated in another form, a business or property, in order to be affected with a public interest, must be such, or be so employed, as to justify the conclusion that it has been devoted to a public use and its use thereby, in effect, granted to the public."

After discussing briefly the cases known as the rental law and the Adamson law, as being cases of emergency, and the later cases on that subject, it is said:

"Nor is the sale of ordinary commodities of trade affected with a public interest so as to justify legislative price fixing. This Court said in *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S., 537:

" 'It has never been supposed, since the adoption of the Constitution, that the business of the butcher or the baker, the tailor, the wood chopper, the mining operator or the miner, was clothed with such a public interest that the price of his product or his wages

could be fixed by State regulation. It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a Colonial legislature sought to exercise the same power; but nowadays, one does not devote one's property or business to a public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.' "

With this broad declaration, there was finally laid to rest the question that has been agitated ever since the case of *Munn* v. *Illinois*. But not satisfied with this conclusion, the opinion goes further. Reviewing Lord Hale's statement in regard to when private property is affected with a public interest, it was said:

"That this phrase was not intended by its author to include private undertakings like those enumerated in the statute now under consideration, is apparent when we consider the connection in which it was used. It occurs in Lord Hale's manuscript, *De Portibus Maris*, 1 Hargrave's Law Tracts, 78, in which the three-fold rights of the proprietor, the public and the King in ports are considered. It first is pointed out that no man can erect a public port without the King's license, though if he set up a port for his private advantage, he may take what rates he and his customers can agree upon. But it is said that if the King or the subject have a public wharf, to which all persons must come, because it is the wharf only licensed by the King, or there is no other wharf in that port, arbitrary and excessive charges cannot be made. For it is then affected with a public interest and ceases to be *juris privati* only; 'as if a man set out a street in a new building on his own land, it is now no longer a bare private interest, but it is affected with a public interest.'

"It is clear that, as there announced, the rule is confined to conveniences made public because of the privilege of maintaining them has been granted by govern-

ment, or because there has arisen what may be termed a constructive grant of the use to the public. That this is what Lord Hale had in mind is borne out, and the question now under discussion is illuminated by the illustration, which he evidently conceived to be pertinent, of a street opened to the public, in which case the assumed grant and resulting right of use is very apparent."

In two later cases the same position was taken, and legislative enactments declared contrary to the Fourteenth Amendment.

In the case of *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S., 1, in holding a Minnesota statute violative of the Fourteenth Amendment, it was said:

"It seems plain enough that the real evil supposed to threaten the cream business was the payment of excessive prices by powerful buyers for the purpose of destroying powerful competition. To prevent this, the statute undertook to require every buyer to adhere to a uniform price fixed by a single transaction.

"As the inhibition of the statute applies irrespective of motive, we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce but also as beneficial to the public. Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequent. Enforcement of the statute would amount to fixing the price at which plaintiff in error may buy, since one purchase would establish this for all points without regard to ordinary trade conditions.

"The real question comes to this: May this state, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public, and not shown now to be accompanied

by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse."

Later, in the case of *Ribnik* v. *McBride*, decided May 28, 1928, the same ruling was applied to a statute fixing the price of services of employment agencies.

By these specific cases, then, it is settled that a legislature may not fix wages; it may not limit the price at which theatre tickets may be sold; it may not fix the price of milk, cream, or butterfats, nor may it fix the rates to be charged by employment agencies.

The principles determined, however, are much broader than the particular cases. Each of these cases declares that in ordinary business, in buying and selling commodities, in rendering services disconnected with the use of property opened to the public, the legislature cannot determine the prices to be paid and received.

There is no reason why the price of gasoline should be fixed by legislative fiat, that does not apply to contracts in regard to all fuel, as coal; to bread, to clothing, to meat, to shelter. Unlimited by the reasoning of the recent cases, the power that it is insisted the Munn case sustains, could be carried into all business, when, in the judgment of the legislature, the businesses become affected with a public interest.

There is in the recent cases a clear and logical line of cleavage that may be followed with certainty.

The case of *Munn v. Illinois*, confined by these later cases to its facts, was decided in 1876. Up to that time, no Act of the State legislature that undertook to regulate the use of private property or the conduct of private business, or even

quasi-public business, had ever been declared invalid as in violation of the Fourteenth Amendment to the Constitution of the United States. In fact, that amendment had been invoked in a very few cases that found their way to this Court. The bench, as well as the bar, and the public at large, had rather vague and indefinite ideas as to the meaning of the Fourteenth Amendment. The first time it was invoked in a case that came to this Court was in the famous Slaughter House cases (16 Wall., 36). In these cases, Mr. Justice Miller said, after referring to the Thirteenth, Fourteenth and Fifteenth Amendments:

> "It is true that only the Fifteenth Amendment mentions the negro by speaking of his color and his slavery, but it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them, as the Fifteenth. We do not say that no one but the negro can share in this protection."

And further, in reference to the equal protection of the law clause of the Fourtenth Amendment, he said:

> "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class or account of their race, will ever be held to come within the purview of this provision."

This was within three years of the time when the case of *Munn* v. *Illinois* was decided.

The next case that we have been able to find was the case of *Kennard* v. *Louisiana*, decided December 1, 1875 (2 Otto, 480). In that case, the State of Louisiana had passed a statute which provided that "in any case in which a person may have been appointed to the office of judge of any Court in this State, and shall have been confirmed by the Senate and commissioned thereto . . . such commission shall be *prima facie* proof of the right of such person to immediately hold and exercise such office."

Section 2 provided, that if "any person, being an incum-

bent in office, shall refuse to vacate the same and turn the same over to the person so commissioned, such person so commissioned shall have the right to proceed by rule before the court of competent jurisdiction, to have himself declared to be entitled to such office, and inducted therein. Such rule shall be taken contradictorily with such incumbent, and shall be made returnable within twenty-four hours, and shall be tried immediately without jury, and by preference over all matters depending in such court; . . . and the judgment thereon shall be signed the same day of rendition."

The next section provided that if an appeal should be taken, it should be taken within one day after the rendition of the judgment, and was made returnable to the Supreme Court within two days.

This Act was attacked as being in violation of the Fourteenth Amendment, and the only question was that Kennard had been deprived of his office without due process of law.

This Court said:

> "It is substantially admitted by counsel in the argument that such is not the case, if it has been done 'in the due course of legal proceedings, according to the rules and forms which have been established for the protection of private rights.' We accept this as a sufficient definition of the term 'due process of law' for the purposes of the present case."

Then, after a review of the Act, the Court held that the Act did not violate the Fourteenth Amendment.

It appears, then, that the only effect of the Fourteenth Amendment considered in this case was that it entitled a citizen to have his property rights passed upon in due course of legal procedings according to those rules and forms which have been made for the protection of private rights.

Aside from the Happersett case (21 Wall., 162), deciding that the Fourteenth Amendment to the Constitution of the United States did not grant citizens the right to vote in a

State election as a privilege and immunity of citizenship, the only other case involving this amendment, prior to the Munn case, was another case similar to the Kennard case.

The first time that the clause was seriously considered, after the case of *Munn* v. *Illinois*, was the case of *Davidson* v. *New Orleans*, 96 U. S., 97, and the Court clearly indicated in that case, that just what the words "due process of law" meant, was not very clear, saying:

> "It must be confessed, however, that the constitutional meaning or value of the phrase, 'due process of law,' remains today without any satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights founded in the Constitution of the several States of the United States."

Mr. Justice Bradley, in a concurring opinion, says:

> "The article is a restraint on the legislative as well as the executive and judicial power of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by mere will," citing with approval *Murray's Lessee* v. *Hoboken Land Co.*, 18 Howard, 272.

He further says:

> "I think, therefore, we are entitled under the Fourteenth Amendment, not only to see that there is some process of law, but 'due process of law,' provided by the State law when a citizen is deprived of his property; and that in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive, and unjust, it may be declared to be 'not due process of law.' Such an examination may be made

without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular State may require."

All of this, then, justifies the statement that when the case of *Munn* v. *Illinois* was decided, no judge on the bench fully realized how far the Courts would go, in subsequent years, in restraining the legislatures of the States from passing laws affecting the use, disposition, and control of private property.

All of the later cases protecting the right of contract, and the management and control of business and use of property, have gone far beyond the conception of this Court at the time the case of *Munn* v. *Illinois* was decided. In many respects it may be argued that the decision in the Munn case was inconsistent with the later cases. It is dependent largely upon the doctrine of *stare decisis*, and the proposition that regulations in regard to big business should not be disturbed. But it cannot be decided in the case at bar to cover the right to deal with all the commodities of life.

This view of the decision of the case of *Munn* v. *Illinois* is sustained by the vigor of the dissenting opinions, and the increasing vigor of the dissents in subsequent cases, and is sustained by the recent cases refusing to carry the rule any further.

It is submitted that there is no power in the State legislature to fix the price of gasoline.

II.

The State cannot exercise an unconstitutional power, as the fixing of prices of commodities, unless the business so affected is one that could be subjected to that power, regardless of monopolies or contracts in restraint of trade.

Passing to the second proposition relied upon to sustain the Act—that is to say, that there is evidence of a monopoly, or unlawful agreements between The Texas Company, the Standard Oil Company, and other oil companies, which tend to create a monopoly, or, in other words, a combination in restraint of trade: It is said that the existence of such conditions vests the power in the State legislature to remedy these conditions by the exercise of the power of the price-fixing function.

It is denied that there is any evidence in the record as would justify the finding as a fact that conditions existed at the time of the passing of the Act as would justify the exercise of such extraordinary power in any event.

The question of fact will be discussed later.

The decisions of this Court clearly establish the proposition that 'the State cannot exercise an unconstitutional power, as the fixing of prices of commodities, unless the business so affected is one that could be subjected to that power, regardless of monopolies or contracts in restraint of trade.' To hold otherwise would make an act constitutional today, when a combination or monopoly existed, and unconstitutional tomorrow when a monopoly or combination in restraint of trade was broken up, and would punish the innocent as well as the guilty. The validity of the law in each case would be made to depend upon the determination of the issue of fact.

From a careful reading of the cases, where discussions of monopoly are embraced in the opinions, it is clear that what was said was that such conditions probably moved the legislature to action and explained the passage of this far-reaching legislation.

In the case of *Brass* v. *Stoeser*, 153 U. S., 391, the question was sharply raised as to whether or not the power to fix the price of the elevation of grain, which had been announced in the Munn case and the Budd case, was applicable

to the case at bar; and it was insisted for the owners of the elevators and the warehouses that the Munn case and the Budd case were decided as they were for the reason that a monopoly in the business existed, while no such situation arose in reference to the elevators in North Dakota.

It was held that such considerations were matters that were addressed only to the legislative discretion, and that:

> "When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and other circumstances."

In the case of *Tyson & Brother* v. *Banton*, 273 U. S., 418, it was said:

> "It is urged that the statutory provision under review may be upheld as an appropriate method of preventing fraud, extortion, collusive arrangements between management and those engaged in reselling tickets, and the like. That such evils exist in some degree in connection with the theatrical business and its ally, the ticket broker, is undoubtedly true, as it unfortunately is true in respect to the same or similar evils in other kinds of business. But evils to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental interference. One vice of the contention is that the statute itself ignores the righteous distinction between guilt and innocence, since it applies wholly, irrespective of the existence of fraud, collusion, or extortion (if that word can have any legal significance as applied to transactions of the kind here dealt with) and fixes the resale price as well where the evils are absent as where they

are present. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught."

The opinion includes a quotation from the case of *Adams* v. *Tanner*, 244 U. S., 590, in reference to a statute of the State of Washington, penalizing the collection of fees for the securing of employment.

The same principle was affirmed in the later case of *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S., 1, as is shown in the quotation from that opinion on a former page of this brief.

The opinion quotes and affirms the principle of the case of *Adams* v. *Tanner*, 244 U. S., 590, referred to above.

In the very late case of *Ribnik* v. *McBride*, *supra*, the same principle was announced.

In the light of these cases, it seems well settled that the power of fixing prices for the sale of a commodity or for the use of property, must be determined by the character of the business legitimately determined; and that power cannot be exercised for the reason that a business otherwise free from legislative restriction happens to be involved in illegal combinations or collusive agreements between those who conduct it.

It may not be amiss here to discuss the facts in reference to the monopoly that it is insisted this record discloses.

The bill of the plaintiffs in this case, and the affidavits in support of it, aver that the plaintiff is an independent dealer, and not engaged in any combination or agreement or collusion with any other company; and, further, that there are a number of other companies in the United States and doing business in Tennessee, that are independent in every respect.

The record further discloses, that prior to the passage of this Act, and at the time it was passed, there were in Tennessee a number of independent oil dealers who had no connection with any of the companies like the Standard Oil Company or The Texas Company, or other larger oil companies doing business in the State, and that prior to the passage of this bill, the larger companies had reduced the price of gasoline to the consumer below the price that it had been in years in the State, and that had been charged by these independent dealers.

When these conditions arose, the independent dealers filed a bill in the Chancery Court of Rutherford County, Tennessee, seeking to enjoin the companies from reducing the price of gasoline to consumers, and compelling them to fix a differential between the wholesale price in tank car lots and the tank wagon price where gasoline was sold to the filling stations, and between the price as sold to filling stations from tank wagons and the price sold to consumers, in order that there should be a spread of prices that the independent dealers would be able to sell their gasoline to consumers at the profit fixed by these differentials. An injunction was granted and kept in effect for a number of months, until finally the bill was dismissed.

It is also clear from the record in this case, that the bill was passed not for the protection of the consumer, but for the purpose of providing these same differentials in price, and to hold the price of gasoline up to the consumer for the benefit of the middlemen.

These are some affirmative facts that appear in the record. To offset this, appellants set up in their answer, two ancient controversies between the people and the Standard Oil Company with which The Texas Company had no connection. The first was an effort on the part of the State of Tennessee to oust the Standard Oil Company of Kentucky from doing business in Tennessee, upon the ground that it was engaged in an effort to stifle competition. We are not interested in that lawsuit. One of the distinguished

counsel for appellants was the leading counsel for the State of Tennessee in that proceeding. He was successful in so far as the legal questions were concerned, and he ousted the Standard Oil Company of Kentucky from doing business in the State of Tennessee.

The other is the controversy between the United States and the Standard Oil Company, which was decided approximately fifteen or eighteen years ago. The Texas Company had no connection with that litigation.

In the light of the principle of law announced, and in the light of these facts, it is submitted that in so far as the monopoly is concerned, the validity of this statute is not helped in any degree by these allegations; and the statute still stands to be determined upon the fundamental question as to whether or not the State has the right to fix the price of gasoline, retail, wholesale, middlemen prices and all.

III

The third proposition that appellants rely on, is this: *That The Texas Company, as a foreign corporation qualified to do business within the State, must submit to the terms of this statute as a condition of remaining in the State; that the State has the right to grant, or refuse to grant, the privilege to The Texas Company and other foreign corporations to do an intrastate business within its borders and having this right, it may prescribe as a condition upon which the privilege is granted, that the corporation submits to a statute which provides that the price of its commodities may be fixed through legislative fiat.*

In the light of the more recent cases, particularly the case of *Terral* v. *Burke Construction Company*, 257 U. S., 529, it seems hardly necessary to discuss this question. It has been, certainly since that case, a settled principle, that while a State may or may not grant to a foreign corporation the right to do intrastate business within its borders,

and might prescribe certain conditions upon which such privilege should be granted, it could not, as one of the provisions, exact from the foreign corporation the surrender of any protection thrown around it by the Federal Constitution.

It would be an imposition upon this Court, and would appear as a vain effort at a display of learning to undertake a review of all the causes that were involved in the decision of the earlier cases up to the case of *Insurance Company* v. *Prewitt*, 202 U. S., 246. That case was overruled by the case of *Terral* v. *Burke Construction Company*, 257 U. S., 529, and in that case it was held that a State could not exact of a foreign corporation, as a condition for receiving permission to operate within the State, the surrender of the right to remove a case to the Federal Court, and said that right was conferred by the Federal Constitution, and that "state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all other of its sovereign powers, is subject to the limitations of the supreme fundamental law."

In the case of *Frost Trucking Company* v. *Railroad Commission of California*, 271 U. S., 583, where the State exacted of all corporations, foreign and domestic, that in order to receive a certificate of convenience to permit the operation of trucks upon the public highways, the corporation should become a common carrier, this Court said:

> "That, consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt, and is not brought into question here. It was expressly so decided in *Michigan Commission* v. *Duke*, 266 U. S., 570. . . . The naked question which we have to determine, therefore, is whether the State may bring about the same result by imposing the unconstitutional

requirement as a condition precedent to the enjoyment of a privilege which, without so deciding, we shall assume to be within the power of the State altogether to withhold if it sees fit to do so. Upon the answer to this question, the constitutionality of the statute now under review will depend.

"There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the State possesses; and the other—the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the State does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the Act here is an offer to the private carrier of a privilege, which the State may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.

"It would be a palpable incongruity to strike down an Act of State legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an Act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the State threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the State, having power to deny the privilege altogether, may grant it upon such

conditions as it sees fit to impose. But the power of the State in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

It is significant that in reaching that conclusion, reliance expressly was put upon the case of *Terral* v. *Burke Construction Company*, thus clearly showing that the same principle that applies to the right of a State in reference to corporations organized within its borders, also applies to that right in reference to domesticated corporations, in that State.

In the case of *Hanover Insurance Company* v. *Harding*, 272 U. S., 494, the principle was applied to a case where a foreign corporation questioned the validity of a tax, and the terms upon which the corporation was admitted to the State was that it agree to this tax. In holding the tax invalid, it was said:

"We do not think that the State must thus relieve itself from granting the equal protection of its laws to a foreign company which has met the conditions precedent to its becoming a quasi-domestic citizen. Of course at the end of the year for which the license has been granted, the State may, in its discretion, impose, as a condition precedent for a renewed license, past compliance with its valid laws; but that does not enable the State to make past compliance with Section 30 a condition precedent to a renewal of the license, if, as we find, that section violates the Fourteenth Amendment; for, as already said, while a State may forbid a foreign corporation to do business within its jurisdiction, or to continue it, it may not do so by imposing on a corporation a sacrifice of its constitutional rights."

In the very late case of *Power Company* v. *Saunders*, 274 U. S., 490, where a State statute provided that actions against domestic corporations must be brought in the county where it has a place of business or in which its chief officer resides, but permitted such actions, if against a foreign corporation, to be brought in any county of the State, endeavor was made to maintain the statute upon the ground that the defendant Power Company assented to the venue condition by seeking and obtaining permission to do business within the State.

This Court said:

> "The contention advanced by counsel for the plaintiff that the defendant impliedly assented to the venue provisions, is answered and refuted by repeated decisions holding that a foreign corporation by seeking and obtaining permission to do business in a State does not thereby become obligated to comply with or estopped from objecting to any provision in the State statutes which is in conflict with the Constitution of the United States."

These cases conclusively show that this position of appellants is unsound and untenable.

However, the Act itself is not directed against foreign corporations. It is directed against all persons and corporations, whether organized under the laws of the State of Tennessee or of any other State.

The caption of the Act, which is Chapter 22 of the Acts of 1927, is in part as follows:

> "AN ACT to regulate the gasoline industry; to regulate the fixing and charging of prices of gasoline, and prescribing a method for determining at what prices gasoline dealers may sell gasoline; to prohibit rebate and discrimination; to create and establish a division of the Department of Finance and Taxation to be known as the Division of Motors and Motor Fuels, fixing the duties of the Commissioner of Finance and

Taxation and of the Superintendent of such division with respect to the regulation of sale prices of gasoline; to provide for the issuance of permits to gasoline dealers under rules and regulations prescribed by the Division of Motors and Motor Fuels," etc.

In the body of the Act, after establishment of a Board to determine the price of gasoline, it says, at Section 4:

> "That every person, firm, or corporation, desiring to engage in the sale of gasoline in intrastate commerce in this State, either at wholesale or retail, shall make application to the Superintendent of the Division of Motors and Motor Fuels therefor, and shall be set out in said application the following information, to-wit:"

And at Section 6, it provides that it shall be unlawful "for any person, firm, or corporation engaged in selling gasoline in Tennessee," etc., to change the price without applying for permission.

Foreign corporations engaged in the business of selling gasoline, had already qualified to do business in the State. The statutes of the State make no reference to the qualification, further than the filing of a charter and the payment of fees.

The Act itself is directed to all persons, firms and corporations, and its validity must be determined by the principle that it is not directed at foreign corporations, or made a condition for the admission of foreign corporations. Directed against "all persons, firms, and corporations" it cannot be held valid as to foreign corporations and invalid as to others.

The Act Violates the Fourteenth Amendment to the Constitution of the United States, in that It Undertakes to protect the Middleman in the Gasoline Business, and Leave the Middleman of all Other Occupations Subject to the Inexorable Law of Commerce and Trade, and to the Advance of Modern Economic Conditions and Principles.

The middleman in the sale of gasoline does not serve a public purpose any more than the middleman in the sale of dry goods, or the sale of flour, or the sale of coal, or the sale of iron. The people as a whole are not very much interested in nurturing this particular class of middleman and leaving all others unprotected and unguarded. The modern system from manufacturer to retailer has become widespread, and saves millions of dollars to the consuming public each year.

The act in question is primarily intended for the protection of the middleman. The answer of the defendants to the Standard Oil Company case has as an exhibit the bill filed by the middlemen and independent oil companies against the oil companies now before this Court, and in that case, the Judge made an order, directing the plaintiffs in these cases to raise the price of gasoline to the consumer, in order to protect the middlemen, and one of the complainants in that case is the author of the Act now under consideration. It is the purpose of this legislation if possible to forge into law, by statute, the questionable power which the chancellor was asked in the case referred to to exercise, and which he did for a time exercise.

But it may be said by opposing counsel that it is necessary to protect the middleman to protect the public from extortionate prices. They may argue that but for the middleman, the consuming public would be at the mercy of the companies plaintiff in this case.

A complete reply to that is this: If the power to fix the price of gasoline exists at all, it exists for the benefit of the general public in the State, and to protect the ultimate purchaser; and the fixing of the price at which gasoline shall be sold to those who buy either in tank car lots or in small quantities, without regard to the middleman, will protect the public far better than an Act which undertakes to make a spread between all three prices and necessarily increase the cost of gasoline to the consuming public.

IV.

That part of the Act is void that undertakes to prohibit discrimination as to prices in sales of gasoline.

The Act provides as follows at Section 8:

> "And it shall be unlawful for any person, firm or corporation engaged in intrastate wholesale or retail sale of gasoline in Tennessee, to discriminate against or in favor of any customer or purchaser of said dealer by selling at a different price to said purchasers in different localities in Tennessee, or to different purchasers in the same locality, provided the dealer may take into consideration the difference in freight rates to different localities."

The theory of the appellant is that requiring the filing of all the information and the schedule of prices by the gasoline companies, even though the prices were fixed by the companies themselves, it would be unlawful, if Section 8 is preserved, to sell to any one person at any different price from that made to another customer. That is to say, that having sold gasoline to any one person at any price, in any part of the State of Tennessee, except from the consideration of freight conditions, is a fixing of the price of gasoline to all other persons in the same locality, and all other localities with similar freight rates.

It is submitted that if the Act should be stripped of the price-fixing power, and these provisions were permitted to stand, the Tennessee Act would be identical in principle and fact with the Act held unconstitutional by this Court in the case of *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S., 1.

An examination of the Act under consideration in that case shows that the following paragraph in the Minnesota law was under consideration:

> "Any person, firm, co-partnership or corporation en-

gaged in the business of buying milk, cream, or butterfat for manufacture or for sale of such milk, cream, or butterfat, who shall discriminate between different sections, localities, communities, or cities of this State, by purchasing such commodity at a higher price or rate in one locality than is paid for the same commodity by said person, firm, co-partnership or corporation in another locality, after making due allowance for the difference, if any, in the actual cost of transportation from the locality of purchase to the locality of manufacture or locality of sale of such milk, cream, or butterfat, shall be deemed guilty of unfair discrimination, and upon conviction thereof shall be punished by a fine of not exceeding one hundred dollars or by imprisonment in the county jail for not exceeding 90 days."

There is no distinction, in principle, between the section quoted from the Minnesota Act and the paragraph quoted from the Tennessee Act. In the one case, the price *paid* for a commodity was fixed by any one sale in a given locality or community. In the other case, the price *asked* for a commodity is fixed in identically the same manner.

In the Fairmont Creamery Company case this Court said:

"It seems plain enough that the real evil supposed to threaten the cream business was the payment of excessive prices by powerful buyers for the purpose of destroying powerful competition. To prevent this the statute undertook to require every buyer to adhere to a uniform price fixed by a single transaction.

"As the inhibition of the statute applies irrespective of motive, we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce but also as beneficial to the public. Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequence. Enforcement of the statute would amount to

fixing the price at which plaintiff in error may buy, since one purchase would establish this for all points without regard to ordinary trade conditions.

"The real question comes to this: May this State, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public, and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse."

Applying the principles of this quotation from the opinion of this Court to the case at bar, it is clear that if the State cannot directly fix the price of gasoline in Tennessee, then it cannot indirectly do the same thing by the method prescribed in Section 8 of the Act. To hold otherwise would be to affirm the exercise of the power which is declared to be the price-fixing power in the case of Fairmont Creamery Company while denying the power in the other portions of the Act.

Aside from any price-fixing power, there is no sound reason why gasoline should be sold in every part of the State of Tennessee at the same price it is sold in any other part of the State, the only difference being a consideration of freight rates. In the maintenance of small stations, the overhead expenses are such that it is not unreasonable, in outlying districts, to charge a greater sum than is charged in business centers where a greater volume of business makes a profit possible.

V.

The Act is Void Because it Gives Legislative Power to the Courts

When we take the Act as a whole, we find, as has been set out, that an appeal can be taken direct from the Commission fixing the price of gasoline, to the Chancery or Circuit Court of Davidson County, and the judges of those Courts are invested with the power not only to pass upon the question as to whether this rate is reasonable, as judges are accustomed to do, and affirm it or reject it, but the judges of these two Courts are authorized to modify it.

There can be no modification of an order fixing the price of gasoline, except to refuse to accept the rate fixed by the Commission and fix a new rate. This, then, is the power that is given to the Courts by the express language of the Act, and under the Act, when the judge fixes a new rate in lieu of the rate fixed by the Commission, it becomes the legal rate and binding upon all citizens of the State, both sellers and purchasers of gasoline. This is a legislative power that the legislature has undertaken to delegate to the judicial department of the government.

The proposition has long been well settled by the Courts of the country, that where the legislative and judicial departments of government are separated by the Constitution, a Court could not be empowered by the legislature to go into the rate-making business.

The Federal Courts, particularly, have adopted the rule, and followed it consistently. One of the clearest discussions of this question is found in the opinion of Hook, District Judge, in the case of *Western Union Telegraph Co.* v. *Myatt*, 98 Fed., 335. In that case, an act of the State of Kansas created what was known as a "Court of Visitation," and gave that Court not only the right in the first instance to make a rate, but afterwards to determine its reasonableness and pass upon that, thus combining within one body both the

legislative and judicial functions. This, Judge Hook held the legislature could not do. He held that under the Constitution of Kansas there were three separate and distinct branches of government created, the legislative, executive and judicial, and that where this was provided, no one department of the government could exercise any of the powers of the other.

The question then came up as to whether or not the Act embraced both legislative and judicial powers. The Court said:

> "The exercise by the State of the power to regulate the conduct of a business affected with a public interest, and to fix and determine as a rule for future observance, the rates and charges for services rendered is wholly a legislative or administrative function. The legislature may, in the first instance, prescribe such regulations and fix definitely the tariff of rates and charges; or, it may lawfully delegate the exercise of such powers, and frequently does, in matters of detail, to some administrative body of its own creation . . . But by whatever name such boards or bodies may be called, or by what authority they may be established or created, or however they may proceed in the performance of their duties, they are, in respect to the powers mentioned, engaged in the exercise of legislative or administrative functions as important in their character as any that are committed to the legislative branch of the government on the subject of property and property rights. In prescribing regulations or rules of action under the police power of the State for the safety and convenience of the public, or in determining a schedule of rates and charges for services to be rendered, they are in no sense performing judicial functions, nor are they in any respect judicial tribunals. The distinction between legislative and judicial functions is a vital one, and it is not subject to alteration or change either by legislative act or judicial decree, for such distinction inheres in the Constitution itself, and is as much a part of it as though it were definitely de-

fined therein. When the legislature has once acted, either by itself or through some supplemental and subordinate board or body, and has prescribed a tariff of rates and charges, then whether its action is violative of some constitutional safeguard or limitation is a judicial question the determination of which involves the exercise of judicial functions. The question is then beyond the province of legislative jurisdiction.

"As applied to this case, the power of the State to fix or limit the charges of telegraph companies for the transmission and delivery of telegraph messages, is a legislative one, but whether the rates so fixed or limited are reasonable to the extent that the enforcement of their operation would amount to the deprivation of the complainant of his property without due process of law and a denial of the equal protection of the laws, and therefore violative of the first section of the Fourteenth Amendment to the Constitution, is a question for the Courts. . . . It follows, therefore, as a corollary to this doctrine, that the Courts have no power to prescribe a schedule of rates and charges for persons engaged in a public or quasi-public service, because that is a legislative prerogative, and that the legislature has no power to forestall the judgment of the courts by declaring that a tariff or schedule prescribed by it is a finality, and thus prevent an inquiry into the reasonableness thereof by the Court in a controversy properly challenging such reasonableness. The legislative prerogative is the power to make the law, to prescribe the regulation or rule of action. The jurisdiction of the Courts is to construe and apply the law or regulation after it is made. The two functions are essentially and vitally different."

Judge Hook cited as authority, *Chicago M. & St. P. R. Co.* v. *Minnesota,* 134 U. S., 418, where the Court held that a statute of the State of Minnesota, as interpreted by the Supreme Court, vested in a Warehouse Commission the right not only to fix a rate but fix it finally, impaired the constitutional rights of the parties complaining who had a right to

have the Courts pass upon the reasonableness of the rate, and in the opinion of the Supreme Court of the United States drew a very sharp distinction between the rate-making power, as a legislative function, and the right of the Court to review that power on the ground that the constitutional right of some complaining party was impaired.

In the case of *Prentis* v. *Atlantic Coast Line Company*, 211 U. S., 210, the same principle was recognized under a different situation.

In that case, the Constitution of Virginia provided that there might be an appeal from the Commission that fixed railroad rates to the Court of Appeals of Virginia, and also provided that on such an appeal, the Court of Appeals of Virginia could not only set aside the rate, but could do exactly what the legislature of the State of Tennessee has authorized the Court to do in this case—modify or establish a rate which should be the legal rate.

The Supreme Court of the United States held that it was within the power of the State of Virginia to vest in its judicial branch of government, legislative functions if it desired to do so. Therefore, the Atlantic Coast Line had filed its bill attacking the rate fixed by the Commission too early, but should have appealed to the Court of Appeals and given that body an opportunity to fix the rate.

However, the Court recognized the proposition that the people of Virginia had vested legislative power in their judicial branch. But as Justice Holmes said:

> "We shall assume, as we have said, that when a State Constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder, so far as the Constitution of the United States is concerned. . . . We shall assume, as we have said, that some of the powers of the Commission are judicial, and we shall assume, without deciding, that if it was proceeding against the appellees to enforce this order and to punish them for a breach, it then would be sitting as

a Court and would be protected from interference on the part of the Courts of the United States.

"But we think it equally plain that the proceedings drawn in question here are legislative in their nature and none the less so that they have taken place with a body which, at another moment, or in its principal or dominant aspect, is a Court such as is meant by Section 720."

After further discussion in reference to the power of the Court of Appeals under the Virginia Constitution, the Court said, in speaking of its decision:

"We admit at once that they have not the same weight in this case. The question to be decided, we repeat, is legislative, whether a certain rule shall be made. Although the appeal is given as a right, it is not a remedy, properly so called. At that time, no case exists. We should hesitate to say, as a general rule, that a right to resort to the Courts would be made always to depend upon keeping a previous watch upon the bodies that make laws, and using every effort and all the machinery available to prevent unconstitutional laws from being passed."

And then the Court holds that if the rate should be affirmed by the Supreme Court of Appeals, the railroad would be at liberty to renew the application in the Circuit Court without fear of being met by the plea of *res adjudicata*.

The principle has been recognized by the Supreme Court of Tennessee in the case of *In re Cumberland Power Company*, 147 Tenn., 504. The identical principle was involved under Chapter 107 of the Acts of 1921, giving certain powers to the Railroad Commission of the State in regard to public utilities. It was provided as follows:

"That the State, any city, or other party aggrieved by any final finding, order, or judgment of the Commission, shall have the right, regardless of the amount involved, to appeal to the Supreme Court of Tennessee,

the same to be taken and perfected within sixty days from the date of such final finding, order or judgment, and that the Supreme Court may, on the petition of the Attorney General or any other party so aggrieved, if said petition be presented within sixty days from the date of the final finding, order or judgment of the Commission, award a writ of supersedeas upon requiring adequate suspension bond to any such final finding, order or judgment, and may renew, affirm, reverse, or *modify* the same as justice may require, and enter therein such order as may be right and just."

The Court in that case held that under the Constitution of the State of Tennessee, the powers of the government were divided into three branches, the legislative, executive, and the judicial branches; that the legislature could not vest legislative powers in the executive branch of the government, nor judicial powers in the legislative branch of the government; that the making of rates was wholly a legislative matter, and the judicial function was in passing upon their reasonableness; that the Railroad Commission was not a court, and could not exercise judicial functions except such quasi-judicial powers incidental to all legislative action. Therefore, that the Acts which provide an appeal from that body to the Supreme Court of the State was invalid, because every man was entitled to his day in court —the lower Court as well as the Appellate Court.

Now if the legislature of the State of Tennessee could not give judicial power to the Railroad Commission, it manifestly follows that it cannot give legislative power to the Chancery and Circuit Courts.

VI.

An Act Void in Part is Wholly Void

It is contended by the appellant, that notwithstanding the fact that it is beyond the power of the State to fix the price

of gasoline, yet there are certain portions of the Act that can still stand, upon the theory that the legislature would be presumed to have passed the provisions that are left even eliminating the ones that are held unconstitutional.

It is the general rule that where a part of the act is held unconstitutional, the Courts will declare the entire act unconstitutional, unless it can say that it is reasonable to suppose that the legislature would have passed the constitutional part, even though they had known that the remainder of the act would have to fall. This is supported by the Trade-Mark Cases, 100 U. S., 82; Employers' Liability Cases, 207 U. S., 463; *Malone* v. *Williams*, 118 Tenn., 390, and *Cummings* v. *Trewhitt*, 113 Tenn., 561.

It is submitted that it has been demonstrated in this brief that the following portions of the Act are unconstitutional:

(a) The general power to fix the price at which gasoline shall be sold.

(b) The indirect power to fix the price of gasoline by the prohibition of discriminations as provided in Section 8 of the Act.

(c) The power to discriminate in favor of middlemen in the gasoline industry, while not protecting the middlemen in other callings.

If these positions are sound, there is nothing left in the act but those portions of the act that require the filing of information and a schedule of charges with the Commissioner. Manifestly these portions of the act were put into the act solely for the purpose of carrying out the three powers or provisions in regard to price-fixing which have been mentioned above. This is clearly manifest from the caption of the act, which in part is as follows:

> "An Act to regulate the gasoline industry; to regulate the fixing and charging of prices of gasoline, and prescribing a method for determining at what prices

gasoline dealers may sell gasoline; to prohibit rebate and discrimination; to create and establish a division of the Department of Finance and Taxation," etc.

The act, stripped of the powers enumerated above, both direct and indirect authority, becomes an empty shell.

For all of these reasons, it is respectfully insisted that the judgment appealed from should be affirmed.

Respectfully submitted,

HARRY T. KLEIN,
C. B. AMES,
JOHN B. KEEBLE,
Attorneys for The Texas Company.